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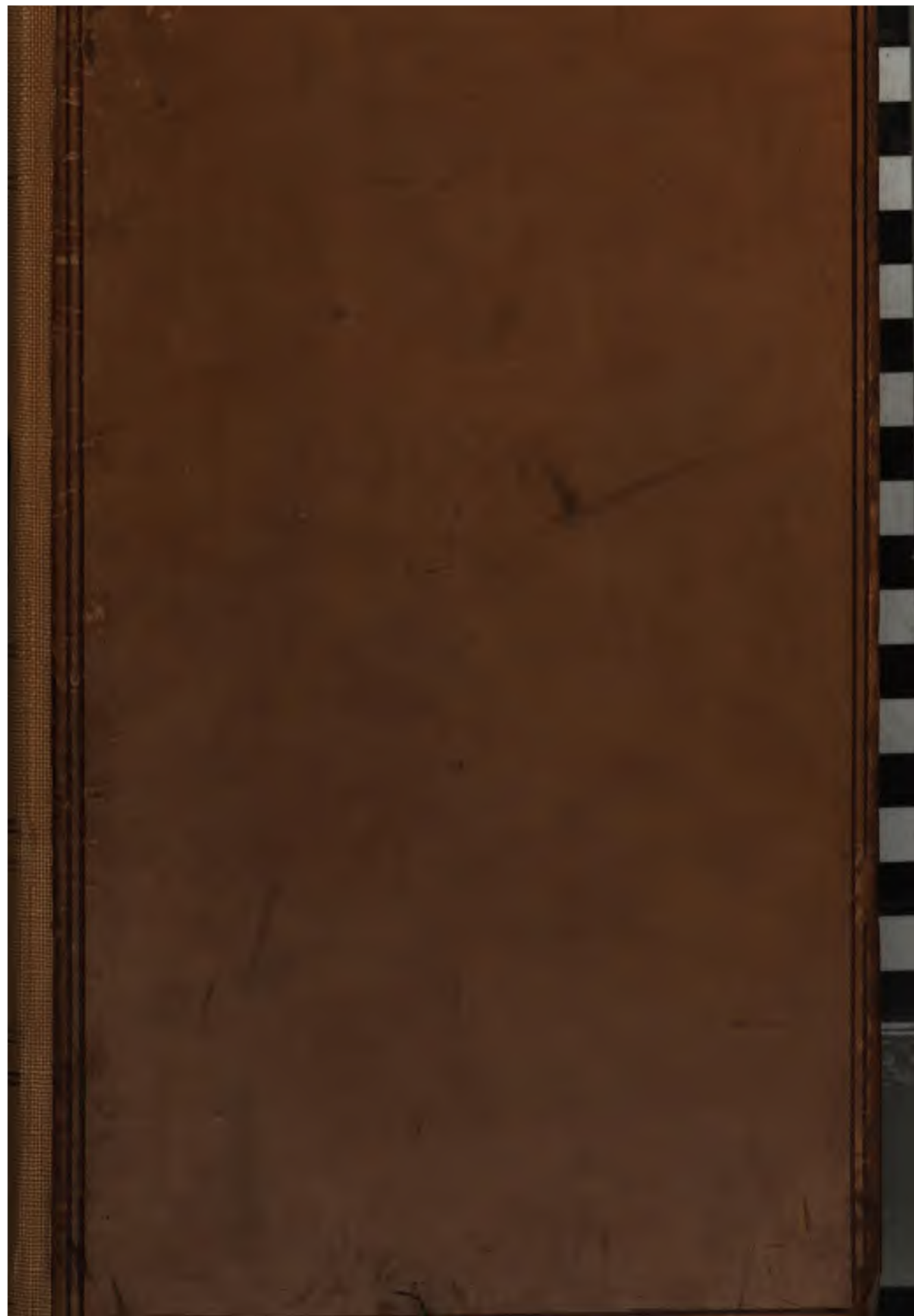
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED IN
THE COURT OF QUEEN'S BENCH,
AND
THE COURT OF EXCHEQUER CHAMBER
ON ERROR FROM THE COURT OF QUEEN'S BENCH.

WITH TABLES OF THE NAMES OF THE CASES ARGUED AND CITED,
AND THE PRINCIPAL MATTERS.

BY
THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,
AND
COLIN BLACKBURN, OF THE INNER TEMPLE,
ESQRS., BARRISTERS AT LAW.

VOL. III.
CONTAINING THE CASES DETERMINED IN HILARY' TERM AND
VACATION, EASTER TERM AND VACATION, AND TRINITY TERM, 1854,
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JUDGES
OF
THE COURT OF QUEEN'S BENCH
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. JOHN LORD CAMPBELL, C. J.
Sir JOHN TAYLOR COLERIDGE, Knt.
Sir WILLIAM WIGHTMAN, Knt.
Sir WILLIAM ERLE, Knt.
Sir CHARLES CROMPTON, Knt.

ATTORNEY GENERAL.
Sir ALEXANDER JAMES EDMUND COCKBURN, Knt.

SOLICITOR GENERAL.
Sir RICHARD BETHELL, Knt.

A

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ERRATA AND ADDENDA.

- Page 27. line 22, for "*Haddon*" read "*Hadow*."
137. line 3, for "*Stevens*" read "*Stephens*."
233. line 20, for "*Rowe*" read "*Roe*."
243. line 17, for "*Woodhouse*" read "*Woodburne*."
268. line 18, after "*Company*" insert "*v. Neilson*."
602. note (c), line 2, for "135" read "66."
" note (c), line 3, after "section" insert "of stat. 4 & 5 *Vict. c. 39*."
698. last line, for "*Robins*" read "*Roberts*."
767. last line but four, prefix a mark of citation commencing before the word "That."
" last line but five, add a mark of citation ending after the semicolon, and prefix
a mark of citation beginning before the word "that."

CASES

1854.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

HILARY TERM,

XVII. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

Lord CAMPBELL C. J.		WIGHTMAN J.
COLERIDGE J.		CROMPTON J.

HUMPHREY EWING MACLAE, FRANCIS SOMERVILLE
and JOHN BLAIR *against* JOHN WILLIAM
SUTHERLAND, JOHN CONNELL, JAMES FAR-
QUHAR, THOMAS NEWMAN FARQUHAR, PATRICK
HADOW and JAMES OCHTERLONY WALKER.

Thursday,
January 12th.

MACLAE
v.
SUTHERLAND.

ASSUMPSIT. First count by plaintiffs as holders of
a promissory note, dated on 1st *August* 1846, made
banking company, called the R. Bank of *A.*, made and issued promissory notes in this form.
"R. Bank
"We, directors of the R. Bank of *A.*, for ourselves and the other shareholders of the said
Company, jointly and severally promise to pay," "for value received on account of the
Company." (Signed) "*A.* Chairman, *B.* and *C.* Directors."
of *A.*"

The directors
of an unin-
corporated and
unregistered
joint stock

Held that, assuming that the parties signing were authorized to sign promissory notes on
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account of the partnership. this form of note shewed sufficiently an intention to bind the partnership jointly; and that, though the attempt to bind the shareholders severally was ultra vires, and void, yet the shareholders were bound jointly.

An action was brought on the notes: they were at five years' date; attached to each were coupons for

half yearly interest at the rate of 5 per cent. till the principal sum would become due. They were issued through a broker, employed by the directors; and the plaintiffs paid him the full value. In the advice notes from the broker to the plaintiffs, the transaction was called a sale of debentures. The money thus raised was employed as capital, in starting branches of the Bank abroad. These facts being stated in a case, in which the Court had power to draw inferences of fact:

Held: that, though the transaction was called "a sale of debentures," yet it appeared to be in substance a loan on the security of the notes; and that, assuming that the directors had authority to borrow it for the partnership, the plaintiffs might recover against the shareholders for money lent.

Held also: that the transaction appeared to be so much out of the ordinary course of banking transactions that the plaintiffs could not recover, merely on the implied authority given to the managers of a joint stock company to do all that was in the ordinary course of the business for which the Company was formed.

The deed of the Company authorized the establishment of branches of the bank in all places east of the *Cape of Good Hope*, and gave very full powers to the directors to manage the whole concern. It also provided that, for the first four years, there should be no general meetings. It appeared that, in fact, the money raised on the notes was employed in establishing branches; that, during the first four years, dividends were paid by the directors; and that afterwards, at three successive general annual meetings, dividends were voted, on the supposition that they were derived from the profits of these branches and received by the shareholders.

Held: that the deed authorized the directors to issue notes, and borrow money, as they had done, for the purpose of starting the branches.

Held also that, supposing it had not, the shareholders must, as an inference of fact, be taken to have ratified the means by which the directors had raised the capital for establishing the branches from which the dividends were derived: it appearing to the Court as a fact that they must have known that the capital was borrowed.

by the defendants, and payable to *John Henry Wray* or bearer at the Union Bank of *London*, on 1st *August* 1851. Averments of presentment, and of non-payment. Second, third and fourth counts on other promissory notes. Fifth count for money lent, interest, and on an account stated.

The defendants severed in their pleadings.

Pleas by defendant *Sutherland*, to each of the first four counts: 1. Non fecit. 2. That plaintiffs were not the holders. And, 3, a denial of the presentment. To the fifth count, Non assumpsit. Issues thereon.

There were similar pleadings by the defendant *Connell*, and by the other four defendants, who pleaded jointly.

On the trial, before Lord *Campbell* C. J., at the Sittings at *Guildhall* after *Trinity* term 1852, a verdict was taken for the plaintiffs, subject to a case, the substance of the more material parts of which is here stated.

The action was brought to recover the amount of four instruments, with interest. The following is a copy of the first.

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SUTHERLAND.

" *The Royal Bank*

£200.

£200.

(273)

London, 1st August, 1846.

We, directors of the Royal Bank of *Australia*, for ourselves and the other shareholders of the said company, jointly and severally promise to pay to *George Henry Wray*, or bearer, on the first day of *August* one thousand eight hundred and fifty one, at the Union Bank of *London*, the sum of two hundred pounds, for value received on account of the Company.

Entered	<i>J. W. Sutherland</i> , Chairman.	
<i>Benjamin Wood</i> ,	<i>Adam Duff</i> ,	} Directors.
Secretary.	<i>John Mitchell</i> ,	

of Australia."

All of the above document was engraved, except the date, the number, and the signatures of the chairman, directors and secretary.

The second and third were precisely similar. The fourth was dated 10th *August* 1846, and payable 10th *August* 1841, and was for 1,000*l*. In other respects it resembled the first.

Annexed to each of the instruments, and on the same sheet of paper, were other instruments, called coupons, payable at successive periods of half a year subsequent to the dates of those instruments respectively, until the sums in the said instruments mentioned should become payable, the sums mentioned in those coupons being respectively an amount equal to half a year's interest, at five per cent. per annum, on the sums mentioned in the respective instruments, which coupons were signed by

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the same persons respectively who signed the said instruments. The interest sought to be recovered was that upon the four instruments, and also the arrears due upon the coupons.

The plaintiffs are the trustees of the marriage settlement of Major and Mrs. *Brown*, and became the holders of the instruments in question under the circumstances after mentioned. The defendants *Sutherland* and *Connell* were directors of a joint stock banking company, called "*The Royal Bank of Australia*," at the time of the making of the said instruments, and continued and were such directors at the time when the plaintiffs became holders of the instruments sued upon, in manner hereinafter mentioned; and the other defendants were during the same periods shareholders. *Wray* was the manager of the bank until its stoppage.

The case stated at length the preliminary meetings of the persons forming the Company. These were ratified by a clause in the deed of settlement of the Company subsequently executed; but nothing material turned upon them.

A deed of settlement of the Company, dated the 3rd August, 1840, was executed shortly after its date by all the defendants, and various other persons. A copy of the deed was made part of the case (a).

(a) The deed recited that the several parties thereto agreed to form a joint stock Company for the purpose of carrying on the trade or business of banking under the name or style of *The Royal Bank of Australia*; and the parties entered into covenants which (as is usual in such deeds) were numbered. The first declared that the name of the firm should be *The Royal Bank of Australia*. The following are the more important clauses.

6. "That the Court of Directors shall have full power and authority to carry on the business of the Company in the city of *London* and in such other cities, towns or places within the United Kingdom, or within Her Majesty's colonies or settlements of *New South Wales*, *Van Diemen's Land*, *Western Australia*, *Southern Australia*, or any other part of *New Holland*,

In *August*, 1840, the directors authorized the establishment of branches of the bank in *Australia*, the one

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or within the islands of *New Zealand*, or within the territories of the Honourable the *East India Company*, or within the colony of the *Cape of Good Hope*, or within any other islands, countries, or territories to which Her Majesty's subjects may lawfully trade beyond the *Cape of Good Hope* to the *Straits of Magellan*, which to the Court of Directors may seem advisable: but the principal office of the Company shall at all times be in the city of *London*."

9. "That the trade or business of the Company shall be that of bankers or of banking, including the making and issuing of bank notes, and bills payable on demand, after sight, after date, or otherwise, and the making of loans and advances to customers and other persons, on open and current accounts, on real or personal estate, on choses in action or in equity, on bonds, covenants, or other personal security, on inland or foreign bills of exchange, or promissory notes, on letters of credit, on bills, on the deposit of bills of lading, dock warrants, or other muniments of title to goods, wares, or merchandises, on ships' bottomries, on lands and tenements, on sheep, cattle, and live stock, on wool, farm stock and produce, and on all and every other kind and description of property whatsoever, and including the discounting of inland or foreign bills of exchange or promissory notes, payable at or after sight, after date, or on demand, and including the borrowing or taking up money at interest on receipts, on inland or foreign bills of exchange or promissory notes, bonds, debentures, deposit receipts, or other obligations, as shall from time to time be deemed expedient, and including the keeping of the money or cash of individuals or other persons at interest or otherwise, and including the dealing in bullion, coins, specie, money, notes, bills, and other securities for money, and including purchased investments, dealings, sales, or advances in or upon the Government or Public Funds of *Great Britain* or *Ireland*, navy bills, exchequer bills, *India* bonds, turnpike bonds, the bonds, bills, or securities of any body of commissioners authorized by Act of Parliament, or charter of the Crown, to borrow money on bonds, bills, or securities, the bonds, bills, or securities of any Company authorized by Act of Parliament or charter of the Crown to borrow money on bonds, bills or securities, the bonds, bills, stock, promissory notes, debentures, engagements, or other securities of any *British* Colonial Government of the *East India Company*, of the Bank of *England*, or of the Bank of *Ireland*, or of any of the Banks of *England*, *Scotland* or *Ireland*, or other joint stock company, whether established by charter, letters patent, Act of Parliament, deed of settlement, or otherwise formed or constituted, or of any foreign or colonial bank, or other joint stock company, shares in the company hereby established, shares in any other joint stock banks carrying on business in the United Kingdom, the colonies

1854. at *Sydney* being the principal one. The rate of interest
 in *Australia* in 1840 was understood to be from 12 to
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or elsewhere, shares in or stock of any other joint stock company or society, or of any annuity or annuities for one or more life or lives, or of any other description; or the stock or funds of any public foreign government or state, or of the stock or shares of or in any foreign public company, or in, upon, or of any freehold, copyhold or leasehold estates, in the United Kingdom, the colonies and dependencies thereof, or elsewhere, or any securities affecting any such freehold, copyhold or leasehold estates, or in, upon or of any other properties, stocks, funds or securities which the Court of Directors shall consider proper and approve of, with power to the Court of Directors to call in, convert into money, reinvest, and vary, such investments, property, stocks, funds, securities and moneys, as occasion may require, and as the Court of Directors shall think proper; and the trade or business of the Company shall also include the acting as agents for joint stock or other banks, joint stock or other companies, and private individuals or other persons in the United Kingdom, the colonies and dependencies thereof, or in foreign parts, in ordering the purchase or sale of stocks, funds or securities, and in receiving dividends, interest, pension, pay, rents, or other income, and in paying or honouring drafts, cheques, bills, or notes, and in doing and performing any other business or acts of agency which the Court of Directors may direct or approve of; but the Company shall not, by the Court of Directors, or by any other persons, or in any manner, pretend or assume to be or act as a corporate body, unless and except so far as the Company shall hereafter be duly incorporated."

10. "That the management of the Company, and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities and moneys for the time being, belonging to the Company, and the regulation and determination of the modes and terms of carrying on and transacting the business of the Company, and all other matters and things whatsoever connected with or relating to the business and concerns of the Company, shall be solely and exclusively vested and reposed in the Court of Directors, except as herein is excepted or otherwise provided."

12. "That all the arrangements, acts, matters and things which have been made or done, and all appointments made by the said present Directors, or any of them, on behalf of the Company, prior to the date of these presents, with regard to the formation of the Company, or in relation to the business or affairs of the Company prior to or since the said 19th day of *February* now last past, shall be, and the same are hereby, respectively ratified and confirmed by the said parties hereto of the first part and every of them."

14. "That the Court of Directors shall nominate and appoint such di-

15 per cent.; and the business of dealing in exchanges was at that time considered a profitable business. The

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rectors, proprietors, or other persons, as they shall think fit to be trustees for and on behalf of the Company, of all or any part or parts of the properties, funds, securities, and moneys of the Company at the discretion of the Court of Directors, and in such sets, with reference to the natures and localities or situations of the different properties, funds, securities, and moneys of the Company, as the Court of Directors shall think expedient; and all such trustees shall act and be under the order and controul of the Court of Directors."

15. "That the general business of the Company shall be carried on in the names of such trustees as shall be appointed for that purpose by the Court of Directors, under the designation of the trustees of the Royal Bank of *Australia*, or under any other designation the Court of Directors shall think fit; and all contracts, securities, estates and effects which shall be entered into, and taken or given on behalf of the Company, shall be entered into and taken or given by the said last mentioned trustees, unless the Court of Directors shall have given express directions to the contrary, and all contracts, securities, estates and effects, which shall be entered into and taken or given by the said last mentioned trustees, shall and may be entered into and taken or given by them in their own names, or by reference to their designation of trustees as aforesaid, as the Court of Directors shall direct; and all suits at law, or in equity, and all prosecutions with respect to any of the properties, funds, securities or moneys belonging or entrusted to the Company, or in which they may have any interest, shall be carried on in the names of the trustees of such properties, funds, securities or moneys; and the several trustees, so to be appointed as aforesaid, shall be continued only during the pleasure of the Court of Directors, and shall be removable at any time by the Court of Directors."

22. "That the properties, funds, securities and moneys hereinbefore authorized to be taken and purchased in the names of trustees, and all moneys to be received or become due thereon, or to arise from the sale, disposition or conversion thereof shall, from time to time, be under the sole controul, and subject to the order and disposition of the Court of Directors; and the resolution or order in writing of the Court of Directors shall be obligatory on, and be a justification to, the said trustees and any attorney or attorneys who shall be appointed by and under them, as aforesaid, as to any conveyance, assignment, purchase, sale, investment, payment, or other disposition whatsoever, of the properties, funds, securities or moneys, to which such order shall relate: and, if any such trustee or attorney as aforesaid shall neglect or refuse to act in any such order as

1854. proceedings of the directors were transacted at courts
 at which the prescribed number of directors attended.
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aforesaid, then, and in every such case, the trustee or attorney, so for the time being, neglecting or refusing, shall thereupon forfeit and pay to the Company the sum of 5000*l.*, as, or by way of, stated or liquidated damages for such neglect or refusal, exclusively and independently of the actual damages which may have been occasioned to or sustained by the Company, in consequence of such neglect or refusal."

23. "That every trustee, on going out of the office of trustee, shall be entitled to call upon the Court of Directors for a discharge of all liabilities whatsoever, in respect of any act, matter or thing made, done, committed or permitted by him, in the capacity of trustee; and the Court of Directors shall, by a resolution or order to that effect, give such discharge to every trustee who shall call or apply for the same, on being satisfied that such trustee has duly accounted for, or paid, or transferred, the trust property and moneys held by him as a trustee, and has not rendered himself liable to the Company for any losses, costs, damages or expenses by his wilful neglect or default."

24. "That the Court of Directors may appropriate and set apart in the names of any of the trustees, or any of the proprietors they shall think fit, so much and such part of the properties, funds, securities, and moneys of the Company as they shall consider necessary or proper, as an indemnity fund against the liability of any trustees or other persons who shall become responsible in respect of any contracts entered into by them on behalf of the Company; and the fund so appropriated shall be liberated, in the whole or in part, when, and so often, and so soon, as the occasion of such appropriation shall cease, by the performance, satisfaction, release, or other discharge, of the contract in respect of which the same shall have been made; and in the mean time shall be held on such terms as shall be prescribed by the Court of Directors at the time of the appropriation thereof."

30. "That the Court of Directors shall and may make all such rules and regulations, and the trustees and the Court of Directors shall and may give to the manager, or any other persons in the employ of the Company, all such powers, in regard to signing, drawing, accepting and indorsing bills of exchange, promissory notes and other negotiable securities, and signing orders and receipts on the account of the Company, and in regard to the management of the business of the Company and the disposition of the properties, funds, securities and moneys of the Company, as the Court of Directors shall think expedient and proper; and no bill, note, or other negotiable security, signed, drawn, accepted or indorsed, or order or re-

The case, after stating this in substance, then proceeded.

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ceipt signed in any other manner than by the person or persons respectively authorized in that behalf as aforesaid, shall be binding on the Company; and each of the proprietors hereby expressly renounces and disclaims all right and title to sign, accept or indorse any bill, note or negotiable security, or to sign any order or receipt in the name of the Company, or to enter into any contract or engagement, so as to charge or bind the Company, or the properties, funds, securities or moneys of or belonging to the Company, unless he shall be expressly authorized so to do, in pursuance of some or one of the provisions herein in that behalf contained: and, in case any proprietor, unless so authorized as aforesaid, shall sign, draw, accept or indorse any bill, note or negotiable security, or sign any order or receipt in the name of the Company, or enter into any contract or engagement, so as or with a view to charge or bind the Company, or the properties, funds, securities or moneys of or belonging to the Company, he shall keep harmless and indemnify the Company from and against all loss, damages and expenses occasioned, or to be occasioned, thereby, and likewise forfeit and pay to the Company the sum of 500*l.*, as or by way of stated or liquidated damages for having done or committed the act in respect of which such last mentioned sum shall become payable, exclusively and independently of the actual damages which may be occasioned or sustained by or in consequence of such act; and he shall thereupon also forfeit his shares in the Company to the Company; and the same may be sold; and the net proceeds of such sale shall be applied as hereinafter in that behalf mentioned."

43. "That the Court of Directors may issue, at any of the offices or banking houses where the business of the Company shall be carried on, any notes or bills payable after date, after sight, on demand, or otherwise, which it shall be lawful or competent for the Company to issue under or consistently with the laws for the time being in force in relation to bankers or banking companies, and may enter into compositions with the Commissioners of Stamps for the duties (if any) payable in respect of any such notes and bills, and may cause such bonds and securities to be given and entered into by sureties on behalf of the Company for the payment of such duties or otherwise, as shall be required; and such sureties shall be indemnified in regard thereto by and out of the properties, funds, securities, or moneys of the Company."

Sect. 81 provided that a general meeting of the proprietors should be held on the last *Wednesday* in *July* 1845, and on the last *Wednesday* in *July* in every succeeding year, at *London*.

1854. “The total number of shares allotted otherwise than
MACLAE to the directors as hereinafter mentioned were 4,501,
v. which were divided amongst a proprietary of about 150
SUTHERLAND. persons, the generality of whom held but a small number
of shares. Upon these 4,501 shares two deposits, one
of 2*l.* per share paid by the shareholders on applying
for shares, and another of 3*l.* per share paid on their
receiving such shares, which two deposits are for
convenience hereafter called the first call of 5*l.*, and
amounting in the aggregate to 22,505*l.*, were duly paid
prior to the subscription of the deed of settlement by
the shareholders; and a second call of 5*l.* per share was
afterwards made on the 20th of *January*, 1841, and
became payable on the 31st of *March*, 1841, and was
duly paid in respect of the above mentioned 4,501
shares at or about the time when it became due: and no
further call was made until the 1st *November*, 1847,
when a third call of 5*l.* was made, payable on the 25th
of the same month. In the above 4,501 shares there
was only included, as taken and paid upon by the
directors, 20 shares each, being the number which
would qualify them as directors under the deed of
settlement; but, in addition to the qualification so taken
and paid upon,” the case then shewed that the directors
took, in different proportions, 8,400 shares, on which
they did not pay up their calls, but gave promissory
notes for the amount, which in the end were only par-
tially realised. The case then proceeded. “On the
31st of *March* 1841, the paid up capital of the Company,
independently of the notes so given by the directors,
was represented by 4,501 shares with 10*l.* per share,
being the said first and second 5*l.* calls paid up,
amounting to 45,000*l.* Up to the 31st of *December*,

1841, the items charged to preliminary expenses against the Company in the said books amount to 12,177*L*."

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An account, taken from the ledger of the Company, set out in this part of the case, shewed the whole of the business transactions down to the 30th of *November*, 1841, and contained nothing but banking transactions, which were on a small scale, the whole amount of the debit side in the year 1841 being under 7000*L*.

"Up to the last mentioned date, 30th *November*, 1841, no losses had been incurred by or on behalf of the Bank; nor debts.

"The directors from time to time took up large sums at interest on instruments with coupons attached in the same form as those above mentioned and described. These sums were sent out to *Sydney* chiefly in bills of exchange, for the purpose of being employed under the superintendence of Mr. *Benjamin Boyd* and Mr. *Robinson*, two of the directors, the former being the chairman, who went out at the end of 1841, as after mentioned, for the purpose of superintending the transactions of the Bank in *Australia* generally, and in whom, particularly the said *Benjamin Boyd*, the directors in *England*, for a long time, reposed the most implicit confidence."

"Some portion of the sums raised was taken up through the means of Messrs. *B. and M. Boyd*, and some through the means of *Robert Allan*, an agent in *Scotland*, whose appointment was confirmed by the directors' minute of the 7th *October*, 1840: Appendix (*a*). The directors had an account with Messrs. *B. and M. Boyd*, which included the instruments issued through

(a) See p. 12, post, note (*a*).

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them. *Allan* generally accounted for the sums received by him to Messrs. *B. and M. Boyd*, who included these sums in their account with the directors, but occasionally accounted directly with the directors, but was treated more as the agent of the *Boyd*s than of the directors. He always accounted either to Messrs. *B. and M. Boyd* or to the directors.

"The same form of instrument, with necessary variations as to dates, amounts and signatures, was always used.

"Frequently, instead of receiving cash for the said instruments, the directors received acceptances of banks and joint stock companies at long dates, but always for the same amount as the said instruments. These acceptances were considered by the directors as more advantageous for banking purposes than cash."

"On 4th *November*, 1840, the said *Allan* sent to the directors the letter set out in the Appendix (a), requesting to be furnished with a copy of the Bank contract. The directors, on the 11th *November*, 1840, passed the resolution which appears by the minute in the Appendix (a). An abstract of the deed of

(a) The following parts of minutes and documents set out in the Appendix to the case have a bearing on this part of the case. "At a meeting of the Royal Bank of *Australia*, held on *Monday*, 17th of *August*, 1840—Present," &c. "A proof of the debenture or deposit note, the form of which had been previously agreed to by the board, was submitted and approved."

"At a meeting of the Royal Bank of *Australia*, held on *Wednesday* the 9th of *September*, 1840—Present," &c.: "It was resolved, that the debentures or deposit notes, which had been approved of at a former meeting, should be stamped and signed; and, as it was considered more judicious that these securities should not be issued direct by the Bank, instructions were given to Messrs. *B. and M. Boyd*, the brokers of the Company, to undertake the issuing of the same; the commission to be 10s. per cent. per annum, according to the number of years specified on the bonds."

settlement was sent accordingly, with a copy of the signatures."

The case gave the particulars of the instruments issued previously to *August* 1841, amounting in the whole to 174,002*l.* 10*s.*, which were issued in exchange

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"At a meeting of the Royal Bank of *Australia*, held on *Wednesday*, 7th *October*, 1840—Present," &c.: "The subject of the appointment of agent of the Bank at *Edinburgh* was considered; and, it being mentioned that Mr. *Robert Allan* had acted in that capacity in the disposal of shares, and shown great zeal in its success, the Board had determined to confirm the appointment, and directed that 10,000*l.* of the debentures of the Bank should be lodged forthwith with that gentleman, to be sold as opportunities might offer."

"At a meeting of the Royal Bank of *Australia*, held on the 4th *November*, 1840—Present," &c.: "A letter was read from Mr. *Allan*, in which, *inter alia*, he stated that it would be desirable he should be furnished with a copy of the contract of the Bank, shewing the power vested in the directors, enabling them to raise money by way of deposit notes or debentures, and which the Board directed Mr. *Allan* should be furnished with."

Letter—*Robert Allan* to *G. H. Wray*.

"*Edinburgh*, 7th *November*, 1840.

"It is extremely desirable that I should be furnished with a copy of the Bank contract, as there are frequent queries put which it is impossible for me to answer without being acquainted with its contents." "You must manage to let me have such a document, as it will strengthen my hands materially."

"At a meeting of the Royal Bank of *Australia*, held on the 11th *November*, 1840—Present," &c.: "A letter was read from Mr. *Allan*, in which he, *inter alia*, intimated that it was desirable, and would tend to give confidence and promote the interest of the Bank, if he was in possession of copious extracts, or a copy of the deed of settlement. The board directed that the chairman should make such extracts from the deed as he thought would meet Mr. *Allan's* views, and have notarial copy of the same made, with the signatures of those who had signed the deed attached."

"At a meeting of the Royal Bank of *Australia*, held on the 18th of *November*, 1840—Present," &c.: "The chairman submitted the excerpts from the deed of settlement, prepared for Mr. *Allan*, to exhibit to parties in *Scotland*, and which was approved by the board, and instructions given in writing to Mr. *Allan* to ask his opinion of the advantage of inserting the Bank's advertisement in the *Scotch* newspapers, with his name attached as its agent."

1854. for securities, most of which were ultimately realised ;
 and proceeded.
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“In addition to the foregoing amount of 174,002*l.* 10*s.*, the directors had issued, in the months of *August* and *September*, 1841, two further amounts of 6000*l.* and 11,200*l.*, making a total of 228,302*l.* 10*s.*, from which, after deducting 37,100*l.* signed, but remaining in hand, there was 191,202*l.* 10*s.* actually issued (a). The sum total of the bills, promissory notes, &c., for which the said instruments were so sold or exchanged, were always the same as the sum total of the instruments ; and the interest began to run in favour of the holder from the time of such sale or exchange. Instruments to the amount of 194,000*l.* were issued by the directors between the 31st *July* and 31st *December*, 1841.

“During the years 1842 and 1843 the amounts of such instruments issued by them increased to 277,950*l.* After the end of the year 1844 the balance of such instruments at any one time outstanding did not vary to any great extent.

“On 31st *December*, 1844, the sum or balance of them then outstanding was 285,450*l.* ; on 31st *December*, 1845, that sum or balance was 312,352*l.* ; on 31st *December*, 1846, it was 282,350*l.* ; on 31st *December*, 1847, it was 279,600*l.*”

The case then shewed that the greater portion of the funds so raised were sent out to *Australia* in the possession of Mr. *Boyd*, who went out to *Sydney* branch in

(a) It is so stated in the case, but apparently by mistake : the meaning being that the sums mentioned gave the amount issued, viz. 191,202*l.* 10*s.*, by adding to which 37,100*l.*, the amount signed but not issued, would be given the total, 228,302*l.* 10*s.* The error is of no importance as to the legal result.

January 1842. After several statements not material the case proceeded. "A large proportion of the instruments issued in 1841 became due in the latter half of the year 1846. Funds were not received from *Australia* or elsewhere to meet them; and the directors had no funds in hand. The whole of the instruments which became payable before the end of 1847 were either paid or renewed when they fell due. The greater portion was renewed. In 1846 the plaintiffs purchased the instruments sued upon, with coupons annexed as aforesaid, under the following circumstances.

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"The said *G. H. Wray*, on 22d *July*, 1846, by order of the directors, sent to the said *Robert Allan* at *Edinburgh* 26,000*l.* of such instruments as aforesaid, with a letter of that date: Appendix, p. 50 (a).

"On 1st *August*, 1846, *Wray* similarly sent to *Allan* 8000*l.* of such instruments as aforesaid. Amongst them were the three instruments of that date, sued on by the plaintiffs, together with a letter of the same date: Appendix (b).

"On 6th *August*, 1846, *Wray* similarly sent 20,000*l.* of such instruments as aforesaid, amongst which was the instrument of the 10th *August* sued upon, together with a letter.

"The plaintiffs, as such trustees as aforesaid, had become, as hereinafter mentioned, the holders of an

(a) This letter was as follows. "With this you will receive 26,000*l.* of deposit notes in two registered parcels, viz." (setting out the numbers). "As you are fully aware of the importance of our having ample funds on or before the first of next month in cash, I need only request your acknowledgment by return of post."

(b) This letter was as follows. "I beg to advise having sent this day 8000*l.* in deposit notes of two and three hundred each, and which from their small amounts I hope will be easily placed."

1854. instrument, No. A. 217., for 100*l.*, in the same form as
 the present, dated 6th *February*, 1841, and payable on
 the 6th *February*, 1847; and on 20th *November*, 1846,
 Mr. *Blair*, one of the plaintiffs, gave *Robert Allan*, for
 the three first of the instruments sued upon, and the
 said coupons so annexed as aforesaid, the amount of the
 same instruments in cash, deducting the amount of the
 instrument for 100*l.* held by him, with the amount of
 the then due and unpaid coupons thereunto attached as
 aforesaid, and received in return the instruments so
 purchased and similar coupons as aforesaid annexed
 thereto.

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“The following note of the above purchase was sent
 by *Allan* to Mr. *Blair*, enclosed in the letter which
 follows.

Purchased for <i>John Blair</i> , Esq.						£	s.	d.
<i>R. B. of Australia</i> debenture No. 273 payable, 1st <i>August</i> ,								
1851	-	-	-	-	-	200	0	0
Ditto	Ditto	274	ditto	-	-	200	0	0
Ditto	Ditto	277	payable, 1st <i>February</i> ,					
1852	-	-	-	-	-	200	0	0
Interest on 500 <i>l.</i> (112 days)	-	-	-	-	-	7	13	6
						607	13	6
Less Ditto	Ditto, No. A. 217	-	-	-	-	100	0	0
						£507	13	6

Dear Sir,

Edinburgh 20 Nov. 1846.

The above is a note of the debentures which you
 purchased today. (Signed) *R. & T. Allan*.

“On 23rd *December*, 1846, Mr. *Blair* gave *Allan*, for
 the fourth instrument, sued upon, that for 1000*l.* and
 coupons annexed as aforesaid, the amount of the same
 instrument, and received the same instrument and
 coupons annexed.

"The following note of the last mentioned purchase was handed by *Allan* to Mr. *Blair*, at the time of the purchase.

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	£	s.	d.
Purchased for <i>John Blair, Esq.</i>			
Royal Bank of Australia Deposit Note, P.	1000	0	0
Interest from 10th August	18	10	0
	£1018	10	0

No. D. 349, payable 10th August, 1851.

Edinburgh, 23rd December, 1846.

Robt. & Thos. Allan.

"No commission was charged by *Allan* to *Blair* upon any of the transactions. At the time of the said sale of the said instruments and coupons by *Allan*, he, the said *Allan*, held for sale, and sold, other such instruments with coupons so annexed, as broker for other parties who had previously purchased them; and *Allan* was both before and at and after that time engaged in selling, and sold, all such instruments, charging commission. The amounts received by *Allan* on the sale of the instruments in respect of which this action is brought were accounted for by *Allan*, together with the proceeds of other transactions, to Messrs. *B. and M. Boyd*, so appointed brokers as aforesaid, and by the latter to the directors, after deducting a further sum for the commission of the said Messrs. *Boyd*. The Bank had no ledger account with *Allan*.

"On 27th July, 1846, *Allan*, by means of instruments to the amount of 20,000*l.*, part of the said instruments forwarded to him on 22d of that month, took up other such notes or instruments issued in 1841, to the amount of 18,500*l.*, and also 600*l.* of coupons, and sent them to the directors through Messrs. *Benjamin and Mark Boyd*, with a letter of credit for the balance of 900*l.*

"On 15th August, 1846, *Allan*, by means of other such

1854. instruments to the amount of 30,000*L*, part of the said

MACLAE instruments forwarded to him on the 22d *July*, and
v. 1st and 6th *August*, took up other such notes or instru-
SUTHERLAND. ments issued in 1841, to the amount of 30,000*L*, which
was reported to the directors at a board on the 19th
August, when the instruments so taken up were can-
celled, and an entry of the remittance and cancellation
was made in the minute book.

“A further remittance was made by *Allan* to Messrs.
Boyd on 29th *December*, 1846, accompanied by a letter
relating, amongst other things, to the said sale of the
said instruments so purchased by the plaintiffs, and sued
upon, and which will be found in the Appendix (a).
The nos. 273, 274, 277 and 349, specified at the end
of the last mentioned letter amongst debentures sold to
sundries, denote the instruments so sold to the plaintiffs
and sued upon.

“In *June*, 1843, *Allan* had shewn to Mr. *Blair* a printed
list of the shareholders of the Royal Bank of *Australia*,
which included the present defendants, and had recom-
mended an investment on the security of such instru-
ments as a safe one, terming them deposit notes. Mr.
Blair, having communicated with his co-trustees on
8th *July*, 1843, purchased two such instruments, with
such coupons so annexed from *Allan*, one of 500*L*,
No. B. 236., dated 2d *August*, 1841, and payable 2d

(a) The part bearing on this subject was: “I now beg to hand you
statement of how our debenture account at present stands.” “We have
taken up the 10,000*L* bill at the Exchange Bank out of the proceeds of the
12,000*L* debentures sold, and now hold your order at par for the balance.”

In the debenture account attached Messrs. *Boyd* were debited, inter alia,
with “Commission on loan of 40,000*L* at $\frac{1}{2}$ per cent.” “Do. 12,000*L*
value debentures sold at 1 per cent.” And they were credited, among other
things, with “Amount of debentures sold as per note subjoined, and interest,
12,243*L* 10*s*. 2*d*.” The note subjoined specified the numbers of the de-
bentures sold.

August, 1846, and signed, *B. Boyd, John Mitchell* and *J. P. Robinson*; and the other of 1000*l.*, No. B. 306., dated 2d *August*, 1841, and payable 2d *November*, 1846, and signed *B. Boyd, W. P. Craufurd* and *J. P. Robinson*; and paid *Allan* the amount of the same instruments.

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"On 25th *August*, 1843, Mr. *Blair* purchased the before mentioned instrument for 100*l.*, with coupons so annexed, signed, *J. W. Sutherland, John Mitchell* and *J. P. Robinson*, and paid *Allan* the amount of the said instrument. The separate coupons annexed to these instruments purchased in 1843 were duly paid; and the instruments purchased in that year for 500*l.* and 1000*l.* were respectively paid when due.

"Advertisements were inserted by *Allan* in the '*North British Advertiser*' newspaper, several times, and were seen by Mr. *Blair*, about the dates, and which will be found in the Appendix (a).

"The coupons annexed to the said instruments sued upon, which fell due on the 1st of *February*, 1847, 1st *August*, 1847, 1st *February*, 1848, 1st *August*, 1848, 10th *February*, 1847, 10th *August*, 1847, 10th *February*, 1848, and 10th *August*, 1848, were respectively duly paid."

The case then set out at great length the accounts and letters received from *Australia*, and other matters. As these were important only as evidence, from which the Court under the power reserved in the case was to draw inferences of fact, and the inferences drawn appear in the judgment, it is unnecessary to do more than state shortly that the funds raised in this country were employed in banking business in *Australia* and lost there; the Company stopping payment in 1848: but that the

(a) In these advertisements *Allan* was termed "agent for Scotland" for *The Royal Bank of Australia*.

1854. directors in this country may at first have believed that
 the concern was very flourishing. On 30th *July*, 1845,
 the first general meeting of the shareholders was held,
 and a report and balance sheet read. On 29th *July*,
 1846, the second general meeting was held and a report
 and balance sheet read. And on the 11th *August*, 1847,
 the third meeting was held and a report and balance
 sheet read. All these reports and balance sheets were
 set out in the case. They all represented the Bank as
 very flourishing, and recommended dividends. The
 first balance sheet (a) presented at the meeting in 1845
 was as follows.

Royal Bank of <i>Australia</i> , 30th <i>June</i> , 1845.										
Cr. LIABILITIES.				£	s.	d.	Dr. ASSETS.	£	s.	d.
Paid up capital, 10l. per share on 11,620 shares	116,200	0	0				Cash, bills, remittances, loans, and other secu- rities	124,245	19	3
Due on deposit, bills payable, bills for col- lection, and to <i>Mel- bourne</i> branch	334,794	11	7				Preliminary expenses, including fixtures, fur- niture at the different establishments at home and abroad, freight and passage money of es- tablishment	12,344	0	8
Surplus profit	26,873	9	8				Advance to 31st <i>Dec.</i> 1844, made on sheep, cattle, horses and sta- tions for the same; wool, lands, houses, wharves and discounts, &c.	341,278	1	4
	<u>£477,868</u>	<u>1</u>	<u>3</u>					<u>£477,868</u>	<u>1</u>	<u>3</u>
Assets in the colonies, £341,278	1	4					Balance accruing from surplus value of pro- perty in the colony	26,873	9	8
Remittances to do., 267,648	16	8					Four dividends paid to shareholders to 15th of			
Profit and surplus value	73,629	4	8				April	24,687	17	6

(a) For some details of the reports of 1846 and 1847, see the judgment, post, p. 46.

Profit on discounts, commissions, &c.	£4,595 17 2	Interest paid on deposits £18,997 0 7	1854.
		Expenses of London es- tablishment since 1841, including stationery, postages, advertise- ments, &c.	MACLAE v. SUTHERLAND.
		7,666 14 1	
	£78,225 1 10	£78,225 1 10	
<i>Dr.</i>	Appropriation of Surplus	<i>Cr.</i>	£. s. d.
Profit as above, after deducting all ex- penses and payment of four year's dividend to shareholders on paid up capital to 15th of April 1845.	£ s. d. 26,873 9 8	Proportion carried to preliminary expenses Retained to pay deposit notes falling due in September next Undivided profits car- ried to profit and loss; new account including balance at bankers	500 0 0 20,900 0 0 5473 9 8
	£26,873 9 8	£26,873 9 8	

The case then proceeded. "The said three reports were printed, and a copy sent to each shareholder. The dividends mentioned in the said three reports were paid; and each of the defendants received an amount proportioned to the number of shares for which he had subscribed. A general meeting was held in 1848; but the directors did not submit any report to the meeting, but asked for an adjournment, until they should receive full accounts from Mr. *Sprot Boyd*, whom they had sent out in the end of 1847, to enquire into the affairs of the Company in *Australia*. In the year 1848, the directors made a fourth call of 2*l.* 10*s.* per share, and a fifth call of 5*l.* per share; neither of which were paid."

"On the 26th *January*, 1849, a circular was issued by order of the directors to the shareholders. The shareholders, including the defendants *James Farquhar*, *Thomas Newman Farquhar*, *Patrick Hadow* and *James Ochterlony Walker*, on receiving the last mentioned

1854. circular, denied their liability in respect of the said instruments, and refused to be bound by the acts of the directors, except so far as they were bound in having executed the said deed of settlement of the Company.

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“About the end of the year 1848, the said Company suspended payment: and, in the latter end of the year 1849, a petition was presented under the Winding up Acts; and an order was made for the winding up the affairs of the Company under those Acts on the 26th of *March*, 1850. The signatures to the instruments in question are those of directors. The said instruments sued upon were duly presented for payment. Neither the defendants, *James Farquhar*, *Thomas Newman Farquhar*, *Patrick Hadow* or *James Ochterlony Walker* was present at any of the said general meetings.”

After some statements not important, the case concluded. “The directors in *England* had such interest in the Bank as above mentioned. They were also entitled to be paid for their attendances. These were not paid at the time, but were set off in their account in respect of credit shares in 1844, and ultimately settled in 1847. Except as aforesaid, and excepting their liability to pay up the balance of their credit shares, and any more immediate liability to creditors upon such instruments, their interests did not differ from that of the other proprietors. They never used the funds of the Bank for their own purposes, nor dealt in shares. They acted upon such motives as above mentioned, and not with any view to any separate advantage at the expense of the other shareholders.

“The Court is authorized to draw such inferences as a jury ought to draw.

“The question for the opinion of the Court is, Whether the plaintiffs are entitled to recover or not? If

they are, judgment is to be entered up for the principal and interest: if not, judgment of nonsuit to be entered."

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The case was argued in last *Michaelmas* Term (a).

Cooling, for the plaintiffs. The substantial question is whether authority was given by the shareholders to the directors to sign notes and borrow money on their credit. But the defendants make several objections to the form of the notes, which it will be convenient to dispose of first. Assuming that the directors had authority to sign notes, it is said that these notes do not purport to bind the shareholders, but only to bind the individuals who signed them. But the words "for ourselves and the other shareholders" *primâ facie* mean that the parties signing promise for the whole body; *Ex parte Buckley in re Clarke* (b). In *The Bank of Australasia v. Breillat* (c) the plaintiffs recovered against the Bank of *Australia* on a note the form of which was "I promise to pay" 154,000*l.*, "for value received, for and on behalf of the Bank of *Australia*. J. Norton, Chairman;" and in the judgment it was said that there was a clear *primâ facie* case, the note being "signed on behalf of the Company." And the form of an ordinary Bank of England note is not more clearly intended to bind that Corporation than this was to bind the shareholders. Reliance will be placed on *Healey v. Story* (d); but in that case the joint stock company was a corporation, being registered under stat. 7 & 8 *Vict.* c. 110.; it was framed for a purpose which did not authorize the issuing of notes at all; and, if it could have been bound by a note, the

(a) On *November* 18th, 22d and 23d; before Lord Campbell C. J., Coleridge and Erle Js.

(b) 14 *M. & W.* 469.

(c) 6 *Moore*, P. C. 152, 161, 189.

(d) 3 *Exch.* 3.

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note ought to have been framed in the manner prescribed by stat. 7 & 8 *Vict. c. 110. s. 45.*; so that it was clear the note could not bind the company in that case. The language of the parties there was not, as here, that of agents, but of principals warranting the payment by the corporation; and this difference is accounted for by the circumstance of the debtors being a corporation. *Penkivil v. Connell* (a) was on another of these very notes. All that was there decided was that the note bound the directors, who signed it, personally on their several promise; which is quite consistent with its also binding the shareholders jointly. It will be urged that a partnership can only be bound in the name of the firm; *Kirk v. Blurton* (b). It is unnecessary to enquire how that may be; for the name of the firm "*The Royal Bank of Australia*" is carefully printed on the documents. But, supposing that the notes are for some reason or other informal, the plaintiffs (assuming that the directors had authority to borrow money on the credit of the shareholders) might resort to the count for money lent, and recover the consideration. To this it is answered that this was not a loan, but a purchase, and that there is no count for money received. As to that, the facts are set out in the case. The word "sold" is used in the documents, no doubt; but, if the transaction was in substance a loan, the words are immaterial; *Denton v. Rodie* (c). In that case the borrower was a partner; but the authority of a partner is but an instance of agency. Here *Allan* was "the agent of the Bank," with whom debentures were lodged "to be sold as opportunities might offer"; Minute of 7th *October*, 1840 (d). The very notes which are the subject of the action are sent to

(a) 5 *Exch.* 381.

(b) 9 *M. & W.* 284.

(c) 3 *Camp.* 493.

(d) *Ante*, p. 12, note (a).

him by the manager with a statement that it is important for the Bank to have funds, and of a hope that he can place them; letters of 22d *July*, 1846, and 1st *August*, 1846 (*a*). *Allan* receives from the plaintiffs the full amount; and the Bank have the whole. For whom was *Allan* agent but the Bank? And what was this but in substance a borrowing on their note. Then comes the real question on the merits. The deed of settlement authorized the directors to issue notes and borrow money on the credit of the shareholders; if the deed were silent, the nature of the concern was such as impliedly to give them authority to do so; supposing that there was some private restriction on such authority or that the directors had abused it, still the plaintiffs, who *bonâ fide* gave their money in reliance on the apparent authority of the directors, may recover against the shareholders; and, lastly, the shareholders knew that the directors had borrowed money, and by silently accepting dividends with such knowledge ratified their act. First as to the deed itself (*b*). Sects. 10 and 22 give the whole controul to the Court of directors. In the case it is found that all the proceedings were by courts. Then the nature of the intended business appears from sections 6 and 9. The Bank was to be a bank of issue in almost every place east of the *Cape*. It was also to be a bank in *London*, where it could not be a bank of issue, as the Bank of *England*'s privileges prevent its being so. The directors were to manage matters without accounting to any one until 25th *July*, 1845, when, by sect. 81, the first general meeting was to be held. It is obvious that the whole scheme was to take up money in *England* and lend it east of the *Cape*, making a profit, by the higher rate of interest there. It would be fatal to such

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(a) Ante, p. 15, notes (*a*) and (*b*).

(b) Ante, p. 4, note (*a*).

1854. a scheme if the money could not be taken up for long periods; and sect. 9 expressly includes, as part of their business, "borrowing or taking up money" on "promissory notes," "debentures" "or other obligations." The partners in an ordinary bank have authority to borrow money on the credit of the partnership; *Bank of Australia v. Breillat* (a): much more have the managers of such an unusual concern as this. Here the purposes for which the money was borrowed and to which it was applied were within the very scope of the business; but, supposing it to be otherwise, it would not affect the right of the plaintiffs. In *The Bank of Australia v. Breillat* (b) part of the consideration of the note sued on was an advance to pay off debts alleged to be not legally binding on the defendants. But the Judicial Committee of the Privy Council, in their judgment in that case (c), held that if it were so it could make no difference: "it would be extravagant to hold, that the appellants, lending their money to the Company to enable it to meet its engagements, were bound by this circumstance to see to the nature of those engagements." Here the terms of the deed (d) declare, by sect. 9, that the business of the Company shall include "the borrowing or taking up money at interest." Words nearly similar have been used in the various Bank Acts for a long period, and have been construed to comprehend every species of obtaining money on credit so as to be repayable; *The Bank of England v. Anderson* (e), *Booth v. Bank of England* (g). Such words must therefore be understood to bear this meaning when used by bankers. The defendants contend that the rest of the deed is

(a) 6 Moore, P. C. 194.

(b) 6 Moore, P. C. 152.

(c) 6 Moore, P. C. 201.

(d) Ante, p. 4, 5, note (a).

(e) 3 New Ca. 589.

(g) 7 Cl. & F. 509.

controuled by sects. 14 and 15, and that all things should be done by trustees; but, on looking at those clauses, and comparing them with sects. 23 and 24 which relate to the same subject, it will be seen that the trustees are to act under the controul of the directors, who vest in them what property they think fit. Sect. 30 also is relied on, in that each proprietor renounces all right to sign bills. But that is as proprietor; the right to sign, as members of the governing body, as directors, is not renounced.

(The arguments as to the ratification are omitted, as they turned entirely on the weight of the evidence of knowledge, on the part of the shareholders, of these transactions, to be inferred from their receiving dividends at the same time that the reports and balance sheets were sent to them. The balance sheet of 1845, which is printed in the statement of the case, ante p. 20, will indicate the sort of evidence relied on: and the judgment shews what the inferences of fact drawn by the Court were.)

Sir *Fitzroy Kelly*, for the defendants *J. Farquhar, P. Farquhar, Haddon and Walker* (a). Assuming, for the present, that it can be said that the directors have, either by the deed or otherwise, power to bind the shareholders by all ordinary banking matters and to borrow money on their credit (which is denied), still the defendants are not liable; for these instruments are by no means ordinary banking matters; and there was not in this case any loan. Whatever be the general powers of the partners in a bank, the di-

(a) *Prentice* appeared for the defendant *Sutherland*; and the defendant *Cornell* appeared in person: but the Court declined to hear more than one counsel argue.

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1854. rectors here can at most but have such of them as
MACLAE are consistent with its being a joint stock bank. Now
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SUTHERLAND. no partner in any concern can bind his copartners by
a negotiable instrument jointly *and severally*. [Lord
Campbell C. J. Mr. Cowling has not argued that the
notes are binding upon the shareholders *severally*; and
you may assume that there was no authority on the part
of the directors to bind your clients *severally*. But,
assuming for the moment that there was authority to
bind them jointly, may not the note bind them so
far, though the attempt to bind them *severally* was
ultra vires and inoperative?] No. Supposing that the
maxim, Utile per inutile non vitiatur, applied to the
execution of a procuration, and that the excess could
in such a case, if inoperative, be rejected, still the
addition of a several promise is by no means inoperative
or capable of being rejected. In the first place it is
operative as binding the parties who signed the note,
and also all such shareholders as individually authorized
them so to sign it. Beyond doubt such shareholders are
bound *severally*. It cannot be that the words "We"
"for ourselves and the other shareholders" "jointly and
severally promise to pay" are to be construed as a joint
and several promise as against the shareholder A., who
is shewn to have sanctioned notes in this form, and
only as a joint one against the shareholder B., who did
not. The holder of the note can construe it only as it
purports to be. And if it were held binding as a joint
note the position of the shareholder would be altered;
for he would then be bound to pay it; and, if he pays
such a note, he makes evidence against himself that
he has given authority to bind himself *severally*; and
it is not possible to accompany the payment with such
an explanation as shall shew to all the world that it

is made only in respect of the joint liability. That is one reason why an authority must be strictly pursued, or it does not bind the principal. There are many instances in which this principle is acted upon in questions as to the validity of powers relating to real estate; *Doe dem. Ellis v. Sandham* (a) is one. But the principle is stronger in mercantile transactions of all kinds, as in *Barron v. Fitzgerald* (b), and more particularly where the authority is to execute negotiable instruments, which may come into the possession of persons who must take the instrument as it purports to be. That is the reason why a partnership bill does not bind, unless executed in the name of the firm; *Kirk v. Blurton* (c). In the present case the name of the firm is printed on the note; but the legal effect of the promise is that the individuals jointly and severally promise, not that there is a promise made by procuration of the firm. This was the opinion of the Court of Exchequer in *Penkivil v. Connell* (d). These words cannot be construed as two different promises, one for the firm, one for the individuals; *Ex parte Buckley in re Clarke* (e), *Healey v. Story* (g). In an American case, *Bradlee v. Boston Glass Company* (h), the plaintiffs had lent money to the Company, and received as a security a note in this form: "We, the subscribers, jointly and severally, promise to pay Messrs. J. and T. Bradlee or order, for *The Boston Glass Manufactory*." It was signed by three persons who might have bound the Company by a promissory note duly signed. But Shaw C. J. delivered the judgment of the Court, that the instrument declared

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(a) 1 T. R. 705.

(b) 6 New Ca. 201.

(c) 9 M. & W. 284.

(d) 5 Exch. 381.

(e) 14 M. & W. 469.

(g) 3 Exch. 3.

(h) 16 Pickering's (American) Reports, 347.

1854. on was not the note of the Company. He says:

MACLAE "The words 'jointly and severally' are quite decisive.
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SUTHERLAND. The persons are, 'we, the subscribers,' and it is signed"
A. B. and C. "This word '*severally*' must have its
effect; and its legal effect was to bind each of the
signers. This fixes the undertaking as a personal one.
It would be a forced and wholly untenable construction
to hold, that the Company and signers were all bound;
this would be equally inconsistent with the terms and
with the obvious meaning of the contract." This case
is cited with approbation in *Story On Promissory Notes*,
(2d edition) p. 77. sect. 70.

It has been argued that the plaintiffs, as bonâ fide
holders, are entitled to recover because the directors
have a primâ facie authority to bind the Bank by ordinary
banking transactions. If this were so, still it would be
plain that the note in question is not an ordinary banking
transaction. It is for an unusually long period; and the
attachment of coupons may have the effect of giving
compound interest. But there is no such implied
authority, in case of a joint stock company, to one
partner to bind the others; *Bramah v. Roberts* (a).
The deed only must be looked to; *Kirk v. Bell* (b).
In the present deed there is no authority given: on the
contrary, it is renounced by sect. 30, except when the
instrument is made in the manner there prescribed.
That section stipulates that negotiable instruments shall
not bind the Company unless signed by the manager,
or by some other person authorized by the directors.
The object is that the Company may have a security
against abuse, which practically they have to a great
extent if the negotiable paper must be signed by a

(a) 3 New Ca. 963.

(b) 16 Q. B. 290.

person appointed by the directors at a court, instead of being issuable by any directors of their own power. It is true that the directors might have authorized the three persons who signed these instruments; but it does not appear that they did so authorize them.

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Then as to the count for money lent. It is said that this is a lending to the Bank through the directors, for a term of five years. That, if it were so, would shew how injurious to the shareholders the attempt to bind them severally was; for the plaintiffs, who took what purported to be a joint and several security, would, on discovering that it was not a several security, be entitled at once to bring money had and received. They have not done so, but sue for money lent. Now every word in the statement of the case, and every word in the document, shews that this was not a loan on the security of these instruments, but a purchase of them. The purchaser of a bill may give more or less than its nominal amount, according as it is at a premium or at a discount; but he recovers ultimately the amount in the bill. A lender taking the instrument as a security recovers the amount lent. [Lord Campbell C. J. No doubt purchase and loan are different contracts attended with different incidents.] The case of *Denton v. Rodie* (a) is in point only as shewing that the word sold may be inaccurately used in reference to a transaction of loan. The present case is like *Emly v. Lye* (b). [He then argued that the fair inference to be drawn from the facts stated in the case was that the directors had misapplied the money, and had studiously concealed from the shareholders the fact that it was borrowed, the reports and balance sheets being, according

(a) 3 *Campb.* 493.(b) 15 *East*, 7.

1854. to his argument, so framed as to lead to the inference
MACLAE that the money was deposited for the purpose of remit-
V. tance to *Australia* in the ordinary course of banking
SUTHERLAND. business. And that if the shareholders were in igno-
rance of the transactions they could not ratify them.
The argument on this part of the case is omitted, for
the same reason as the argument for the plaintiffs on the
same part of the case.]

Cowling was heard in reply.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment
of the Court.

The question which we have to determine is: Whether
the shareholders in the unregistered joint stock Com-
pany called "*The Royal Bank of Australia*" are jointly
liable, either as makers of the promissory notes set out
in the special case, or as borrowers of the money sought
to be recovered? One of the defendants, being a
director of the Company, actually signed the notes;
and another was a director when by his authority they
were issued; but the other four defendants can only be
made liable as shareholders. We are of opinion that
the shareholders are liable, both as makers of the notes
and as borrowers of money for which the notes were
intended to be a security.

On the form of the notes several preliminary objec-
tions were taken, which it may be convenient first to
dispose of. Sir *Fitzroy Kelly*, in his able argument,
began by contending that, even supposing that the
directors had authority to bind the shareholders by
promissory notes to secure money for the purposes to

which the sums raised by those notes were to be applied, these notes are not binding on the shareholders, by reason of the words "and severally" introduced into them. It is quite clear that a partner cannot by any instrument make a copartner separately liable for a partnership debt; and a shareholder in this Company separately sued on one of those notes might, in due form, successfully deny his separate liability. But it does not follow that the shareholders may not be jointly liable, if there was authority to bind them by a joint note. Supposing the intention of the instrument to have been to make the shareholders separately as well as jointly liable, and not merely to impose a separate liability upon each of the three directors who signed it, still, as far as the shareholders are concerned, it may be void as a separate and valid as a joint security. The expression in the note by which a separate liability is sought to be created may be easily detached in construing it, and taken *pro non scriptâ*; as against the shareholders it is utterly void, and it does them no injury. The perfect and complete contract of joint liability is not vitiated by the directors having, *ultra vires*, written upon the same piece of paper words which are wholly inoperative. If *A.* and *B.* are in partnership, and *A.* for a partnership debt *bonâ fide* gives a promissory note in the partnership firm, there seems considerable difficulty in contending that *A.* and *B.* may not be jointly sued upon it because it professes to bind them separately as well as jointly. Why should the security perish instead of being available, when, as far as it is sought to be enforced, it might lawfully be created, and it expresses the intention of the parties? Surely this would be unjust and contrary to well known

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1854. legal maxims. No case respecting promissory notes has yet gone further than *Perring v. Hone* (a), which only intimates the truism that a partner cannot make his copartner separately liable by a joint and several promissory note. Sir *Fitzroy Kelly* relied upon various cases respecting the execution of powers, under settlements or wills, as to real estate; but they by no means made out his proposition, that, wherever there is any excess of authority by the donee of the power, what is otherwise, per se, well done in the execution of it is wholly void: and the analogy between the execution of such powers and the making of promissory notes for a partnership debt is so remote that we do not consider it necessary to examine further *Doe dem. Ellis v. Sandham* (b), or his other authorities of the same class. *Barron v. Fitzgerald* (c), afterwards cited, is not more in point, as it only says that, if a man requests the advance of money in doing one thing which he requires to be done, he is not liable, in an action for money paid to his use, for a sum of money expended in doing another thing which he did not authorize. It was next objected that those notes are not binding on the shareholders because they are not properly given in the name of the partnership firm. But we are of opinion that, if the directors by whom they are signed had authority to draw them, they are sufficient, as they clearly express an intention that all the shareholders in *The Royal Bank of Australia* should be jointly bound by them; and, unless the names of all the shareholders were enumerated, we hardly know any language by which this intention could be expressed more clearly. A joint

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(a) 4 Bing. 28.

(b) 1 T. R. 705.

(c) 6 New Ca. 201.

stock company, like any other partnership, may have a firm; and, when that firm is properly used, it is supposed to comprehend all the partners. There is no necessity for that firm being signed at the bottom of a promissory note by which a joint stock company is to be bound, any more than the name of a corporation that has power to issue promissory notes; and in point of practice such notes are always signed by directors, or some agent appointed for that purpose. The form of the notes in question is substantially the same as that in *Ex parte Buckley in re Clarke (a)*, which was held to be sufficient to make all the partners jointly liable, being a promise by one partner for himself and the other three partners, and amounting to one promise of the four persons constituting the firm. Here the promise is by three directors who are shareholders, "for themselves and the other shareholders of the said company;" and, if the three directors had authority, the company is bound. *Hall v. Smith (b)* was there declared not to be law: and, considering that the note in that case was signed by the defendant expressly for himself and his two copartners jointly, there seems great difficulty in seeing how he could be considered by using the pronoun "I" to intend to create any separate liability. But, if *Hall v. Smith (b)* could be supported, it would be no authority to shew that a signature in the name of the firm is always necessary to create a joint liability. The defendant's counsel strongly relied upon *Kirk v. John Blurton and Charles Habershon (c)*, in which, the defendants being sued as joint drawers of a bill of

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(a) 14 M. & W. 469.

(b) 1 B. & C. 407.

(c) 9 M. & W. 284.

1854. exchange, it appeared that the bill was drawn by the
defendant *Habershon* in the firm of "*John Blurton*
MACLAE & Co.;" that the two defendants carried on the business
v. of printers in partnership; that the name of *John Blurton*
SUTHERLAND. was written over the door of their place of business; and
a witness stated that they had been in the habit of
drawing bills which he had seen; but he could not take
upon himself to say whether they were in the name of
"*John Blurton*" or of "*John Blurton & Co.*" The
Court of Exchequer, considering "*John Blurton*" to be
the firm, held that *John Blurton* could not be bound by
a bill drawn by *Habershon* in the firm of "*John Blurton*
& Co." It is unnecessary to say how far we concur in
this case; for, at any rate, it only decides that, where
the firm professes to be used, it would necessarily be
fatal to add to the single name, which usually constitutes
the firm, "& Co.," whereas, at the case at bar, the signa-
ture at the bottom of the note does not profess to be
a firm, but the signature of three directors acting for
a joint stock company, and the question must be whether,
when professing to bind the Company, they had authority
to do so. In *Healey v. Story* (a), which was an action by
plaintiff as payee against the two defendants as makers
of a promissory note, it appeared that the defendants
were the directors of a joint stock company called
"*The Wesleyan Newspaper Association*," completely
registered under stat. 7 & 8 Vict. c. 110., and that they
gave to the plaintiff for a debt due from the company a
note in the following form. "*London, March 19, 1847.*"
"On demand, we jointly and severally promise to pay

(a) 3 Exch. 3.

Mr. *Edward Healey*, or order, the sum of 250*l.*, value received, for and on behalf of *The Wesleyan Newspaper Association*.

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“*Parker Story* }
“*James Ware* } Directors.”

The question was whether the defendants were personally liable on the note; and the Court (we think very properly) held that they were; for, this being a quasi corporation, there could be no individual and separate liability intended to be cast upon the shareholders, and the defendants evidently professed to make themselves personally liable. But the doctrine there laid down cannot apply to an instrument expressly professing to bind the shareholders in an unregistered company. The *American case* (a) decided by that very learned Judge Chief Justice *Shaw* of *Massachusetts* we regard with the utmost respect; but it appears to have proceeded exactly on the same principle. The Gas Company being a corporation, and the directors who signed the note having promised “jointly and severally,” it was held not to be the note of the Company, but of the individuals who signed. The decision of the Court of Exchequer in *Penkivil v. Connell* (b), upon one of these very notes issued by *The Royal Bank of Australia*, we entirely concur in. Each director who signs the notes is liable to be sued separately upon them; but this decision does not in any degree affect the joint liability of the shareholders.

It is further objected to the form of the notes on which this action is brought, that they are payable at the unusual period of five years after date, that the

(a) *Bradlee v. Boston Glass Company*, 16 *Pickering's (American) Reports*, 347.

(b) 5 *Exch.* 381.

1854. interest is made payable half yearly by auxiliary notes called coupons, that compound interest might thus be recovered from the Company, and that the first coupon, if issued after the day of its date, would be an infringement of the monopoly of the Bank of *England*. But, in answer to these objections, it is enough to say : that the validity of the notes must depend upon the authority to make them, not the length of the period which they have to run; that, if usury were pleaded and would be a defence to this action, no more than simple interest at 5*l.* per cent. is reserved according to the contract; and that, if there were any objection to the legality of the first coupon, it could not taint with illegality the promissory notes for the principal money at five years' date on which the action is brought.

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We now arrive at the real merits of the cause. And we have to consider whether the directors of this Company had authority under the circumstances stated to make these notes, which are allowed to be signed by three directors and to be issued by order of a court of directors. We do not think that the plaintiffs can rely entirely upon an implied authority in the directors to issue notes and to raise money in the ordinary course of banking business. Although mere shareholders in a joint stock company have no authority to pledge the credit of the company, the directors appointed to carry on the business would have impliedly such of the ordinary powers of partners in a common mercantile partnership as are necessary for the carrying on of the business for which the Company is formed; and, where a joint stock banking company is established, the directors would be considered the agents of the shareholders to borrow money for the ordinary purposes of

the business, and to give securities in the ordinary form for the money borrowed. In the case of *The Bank of Australasia v. Breillat* (a), before the Judicial Committee of the Privy Council, that consummate Judge Mr. *Pemberton Leigh*, Chancellor of the Duchy of Cornwall, in pronouncing the judgment of the Court, says: "The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands, which may be to the extent of a large proportion of his debts, while his profits are to be made in employing his own moneys and those intrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands which may be made upon him; and if a partner has no power, under such circumstances, to borrow money for the partnership, either the assent of each individual member must be obtained, which may often be impracticable, or the concern must be ruined. We have no doubt at all, therefore, that, in ordinary banking partnerships, such power exists, and that the directors, by the terms of their appointment, had all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed."

But, in the present case, the transactions out of which these notes arose cannot be considered to have been in the ordinary course of banking business: the money was originally borrowed to be used as capital; and the securities were not such as would usually be taken for an ordinary loan to a banking company. We therefore

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(a) 6 *Moore*, P. C. 152. 194.

1854. think that it lies upon the plaintiffs to shew that, from
MACLAE some extraordinary course of business described in the
v. deed and authorized by it, or by some extraordinary
SUTHERLAND. powers conferred upon the directors, they could bind
the Company in a manner that would have been incompetent to the partners of a banking firm, or the directors of a joint stock company instituted to carry on the usual operations of banking; or, failing these, that there has been a ratification by the shareholders of these acts of the directors which otherwise would not have been binding on them.

We must therefore apply ourselves in the first place to the deed of settlement executed by the shareholders (a). The scope of the contemplated business is described in sect. 6, by which the directors were to have "full power and authority to carry on the business of the Company in the city of *London* and in such other cities, towns or places within the United Kingdom, or within Her Majesty's colonies or settlements of *New South Wales*, *Van Diemen's Land*, *Western Australia*, *Southern Australia*, or any other part of *New Holland*, or within the islands of *New Zealand*, or within the territories of The Honourable *The East India Company*, or within the colony of the *Cape of Good Hope*, or within any other islands, countries, or territories to which her Majesty's subjects may lawfully trade beyond the *Cape of Good Hope* to the *Straits of Magellan*, which to the court of directors may seem advisable." Thus the directors were not only authorized to carry on the business of banking in *London*, but to establish as many banks as they might deem advisable over almost the whole habitable globe. For this

(a) Ante, note (a), p. 4.

purpose they must incidentally have been vested with much more extensive powers than belong to those who are merely to carry on in one particular locality a bank, either of deposit, or of issue, or of both. Further, sect. 9 expressly declares: "That the trade or business of the Company" (wherever carried on) "shall be that of bankers or of banking, including the making and issuing of bank notes, and bills payable on demand, after sight, after date, or otherwise, and the making of loans" &c. "on lands and tenements, on sheep, cattle, and live stock, on wool, farm stock and produce, and on all and every other kind and description of property whatsoever, and including" "*the borrowing or taking up money at interest on receipts, on inland or foreign bills of exchange or promissory notes, bonds, debentures, deposit receipts, or other obligations, as shall from time to time be deemed expedient.*" Then, by sect. 10, "the management of the Company, and the business and concerns thereof, and the regulation, investment, and application of the properties, funds, securities and moneys for the time being, belonging to the Company, and the regulation and determination of the modes and terms of carrying on and transacting the business of the Company, and all other matters and things whatsoever connected with or relating to the business or concerns of the Company, shall be solely and exclusively vested in and reposed in the court of directors, except as herein is excepted or otherwise provided." With such transcendant powers to accomplish such stupendous objects, can it be said that the directors, for raising capital to trade with, were confined to the sale of shares, and to enforcing calls upon those shares till 50*l.* had been paid upon each, whatever might be the state of the share market, whether the shares of the

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1854. Company might be at a premium or at a discount, and
 MACLAE although the sudden multiplication of calls might ne-
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 said, truly, that the purpose for which the money was
 originally raised by the promissory notes was not (as in
 the *Australasia* and *Australia* case (a)) to discharge any
 pre-existing engagement of the Company: but is there
 not here an express authority given to raise money to
 be employed as capital in the manner which was adopted
 by the directors? They were to borrow or take up
 "money at interest on" "promissory notes," "debentures,"
 "or other obligations." And how to be applied? "In
 making of loans and advances to customers and other
 persons" on lands, tenements, on sheep, cattle, wool, &c.
 Does not this mean that the money might be borrowed on
 promissory notes or debentures in this country, and sent
 to *Australia*, where, branch banks being established, it
 should be lent at a high interest to customers and others
 on lands and tenements, sheep, cattle and other property
 to be pledged? If there was authority so to borrow the
 money, there was authority to give the promissory notes
 or debentures as a security for it: there being authority
 so to borrow the money, the bonâ fide holders for value
 of the promissory notes or debentures could not have
 been prejudiced by the misapplication of it. But, in
 truth, it was not misapplied. The case finds that the
 directors "never used the funds of the Bank for their
 own purposes, nor dealt in shares." And it appears by
 the evidence that the money was carried to *Australia*,
 that a branch was established at *Sydney*, and that a sum
 of above 300,000*l.* was there advanced upon lands, sheep,

(a) *Bank of Australasia v. Breillat*, 6 Moore, P. C. 152.

cattle, wool and such property as is specified in the deed to be taken by the directors as security for advances.

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The plaintiffs likewise relied upon sect. 43 of the deed, which says: "That the court of directors may issue, at any of the offices or banking houses where the business of the Company shall be carried on, any notes or bills payable after date, after sight, on demand, or otherwise, which it shall be lawful or competent for the Company to issue under or consistently with the laws for the time being in force in relation to bankers or banking companies." We think, however, that this applies only to dealing as a bank of issue, and would not extend to the borrowing of money to be employed in trade on such instruments as are the foundation of the present action. To authorize such borrowing we think that the sections previously quoted are abundantly sufficient. According to *The Bank of England v. Anderson (a)*, and various other cases upon the Bank Monopoly Acts, this was a "borrowing or taking up money at interest" "on promissory notes" or "debentures." The observation, that the power of borrowing was confined to borrowing on securities and property which the Company might acquire from others in the course of their dealings, is wholly at variance with the language of the deed. The "promissory notes" and "debentures," there mentioned, were evidently promissory notes and debentures to be originally created by the directors, and given by way of security for sums borrowed on behalf of the Company. In *Burmester v. Norris (b)*, in which it was properly held that there was no power to borrow on the credit of a company, the business to be carried on and the

(a) 3 New Cas. 589.

(b) 6 Exch. 796.

1854. power conferred on the directors by the deed were quite different from what we find here.

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The directors in this Company having such a power of borrowing as they have exercised, it follows that the sums intended to be secured by the promissory notes might be recovered as for money lent, if there were any objection in point of form to the validity of the notes. The defendants contend that this was a mere transaction of *purchase and sale*. The word "purchase" is no doubt used in the documents relating to the affair; but this does not alter its nature; and it resolves itself into a loan of money for a given time at 5*l.* per cent., payable half yearly, the instruments being given as security for payment of principal and interest. There is no difficulty in ascertaining the sum which was lent and is to be recovered. This was originally calculated between the parties according to the sum mentioned in the note, taking into consideration the interest from the time of the advance. The case of *Denton v. Rodie* (a) is an authority, expressly in point, that this transaction may be treated as a loan; and the ruling of Lord *Ellenborough* at *Nisi Prius* seems to have been acted upon by Lord Chancellor *Eldon* who had directed the issue.

We have considered the parts of the deed relied upon by the defendants, particularly sections 14, 15, 23, 24 and 30; and we are of opinion that none of them, by way of exception or provision or otherwise, invalidate the securities sued upon in this action. The appointment of trustees, the duties imposed upon them, their liabilities and their rights, do not in any degree interfere with the authority of the directors to borrow on pro-

(a) 3 *Campb.* 493.

missory notes or debentures. The object of sect. 30 is to prevent any shareholder from signing, accepting or indorsing any bill, note or negotiable security, and to empower the trustees and court of directors to appoint any person in the employ of the Company to sign, draw, accept and indorse bills of exchange, promissory notes and other negotiable securities, without disabling the directors personally to exercise the powers conferred upon them under the sanction of the court of directors. The nullifying words in this section could hardly affect a bonâ fide holder, who, without notice of any irregularity in the framing of the security, might fairly presume that the three directors who sign the notes were duly authorized by a resolution of the court of directors and the trustees to do so, if there ought to have been such a resolution. But these words apply only to bills, notes and securities signed by a manager or agent not duly authorized in the prescribed form.

We are further of opinion that, if there had been any irregularity in the original transaction which would have exempted the shareholders from liability, they would have rendered themselves liable by subsequent ratification. For four years, they were studiously kept in ignorance of the manner in which the business was conducted, they having deliberately consented, during that long period, to remain in ignorance, and to leave every thing to the discretion of the directors in whom they placed unbounded confidence, receiving in the meantime a handsome yearly dividend. At length the 30th day of *July* 1845 arrived, when, according to the deed, there was held the first general meeting of proprietors, and a statement of the affairs of the Company was laid before them. Although this statement is in parts

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obscure, we think that it communicates to any person of ordinary understanding, and in any degree acquainted with commercial affairs, the information that, beyond the paid up capital upon the 11,620 shares represented to have been issued, there had been at least between two and three hundred thousand pounds borrowed by the directors, on the credit of the Company, in this country, and remitted to *Australia* to be used as a trading capital there. The argument, that the item of "remittances to" "the colonies" might mean sums deposited here to be remitted to emigrants by bills of exchange, is completely answered by the item shewing the nature of these remittances and how they had been applied. "Advance to 31st Decr. 1844, made on sheep, cattle, horses and stations for the same; wool, lands, houses, wharves and discounts, &c. 341,278*l.* 1*s.* 4*d.*" The account shews a profit on these transactions of 26,873*l.*, after deducting all expenses &c. and payment of four years' dividend to the shareholders on paid up capital to 15th *April* 1845. A similar report was laid before the shareholders at the general meeting held 29th *July* 1846: and this expressly stated "that the capital of the Bank continues to be employed in advances on the collateral securities of live stock, wool, &c., a system adapted to the circumstances of the colony." It also contains an item of 24,100*l.* for "paying off deposit notes," the name by which the notes given for money borrowed in this country were generally called. The balance of profit was reduced to 17,076*l.* 4*s.* 2*d.*; but out of this balance an increased dividend of 6*l.* per cent. was paid to and received by the shareholders. In the year 1847 a similar report was laid before a general meeting of the shareholders, when, as on former occasions, they by a vote approved of all

that had been done, and thanked the directors for ably and successfully conducting the business of the Company. And again they received a dividend. We may commiserate their situation in the year 1849, when, the Company having become insolvent, an order was made for settling its affairs in the Court of Chancery under the winding up procedure, and they were called upon as contributories; but the acts of the directors, which they now seek to repudiate, we think that they both antecedently authorized, and subsequently ratified. They may have been very ill used by the directors; although it is possible that the directors (who are acquitted of any personal misappropriation of the funds of the Company) may, in common with themselves, have been under the delusive hope that enormous gains would be made from the speculations into which they entered in *Australia*, and that, all concerned being enriched, the engagements of the Company would all be honourably fulfilled. But, whether the directors have misconducted themselves towards the shareholders or not, the loss which has accrued cannot, according to our views of the case, be thrown upon the bonâ fide creditors of the Company.

In the present case we think, upon the evidence submitted to us, that the plaintiffs were the bonâ fide holders of these notes and lenders of the sums intended to be secured thereby; that they are entitled to recover; and therefore that judgment must be entered up in their favour for principal and interest.

Judgment accordingly.

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ERASMUS ROBERT FOSTER, Public Officer of The
 Britannia Mutual Life Association *against* The
 MENTOR Life Assurance Company.

The *M.* insurance Company executed a deed poll which was a

DECARATION on a policy of assurance to the
 trustees of *The Britannia Mutual Life Association*,

life policy for one year on the life of *O.* It was in the ordinary printed form of such policies, and commenced with a recital that the assured had on 21st *November* last caused to be delivered into the office of the *M.* a declaration in writing, signed by them, touching the age, past and present health and other circumstances relating to *O.*, which the assured had agreed should be the basis of the contract. And there was the usual proviso that if any thing in the declaration was untrue the policy should be void. In an action on this policy the *M.* pleaded that the declaration was untrue.

On the trial, it appeared that the policy was one of reinsurance by the *B.* Company, who had several years before insured *O.*'s life for a larger sum. On the negotiation for the reinsurance all the papers relating to the original insurance were shewn to the *M.* The *M.* sent to the *B.* one of their printed forms for a proposal for insurance, adapted to the case of an original insurance, having many printed questions relating to the health of the party, with blanks for the answers, and, below, a printed declaration by the person whose life was to be insured that the above statement was true, and an agreement on the part of the persons who were to be assured that the declaration should be the basis of the contract, and that if any thing therein contained was untrue the policy should be void; with blanks at the bottom of the declaration for the signatures of the person whose life was to be insured, and of those in whose favour the insurance was to be made. The *M.* had bracketted together, in ink, the questions relating to the health of *O.*, and written "for these particulars see *B.* papers attached." The manager of the *B.* signed under this his name, and returned the paper, with the blanks for the signature of the declaration not filled up. The *B.* papers were those relating to the original insurance, and contained a declaration by *O.* as to his then state of health. It was now admitted that this declaration was then true, but that the state of *O.*'s health had, without the knowledge of either the *M.* or the *B.*, changed, and the declaration, referred to the state of health at the time the paper was sent to the *M.*, would no longer be true. After this paper had been sent in, the policy was executed, and sent to the *B.*, who received and kept it without observation on the form of the recital. Some evidence was, without objection, given of a custom in reinsurance to confine the declaration to the state of health at the time of the original insurance.

The learned Judge left it to the jury to consider all the circumstances, and say whether it was intended by both parties that the paper should be understood as a declaration as to *O.*'s present health. The jury found for the plaintiff. On a motion for a new trial the Court were equally divided.

Erle J. held that the terms of the policy shewed that the contract was on the basis of there being a declaration as to the then state of *O.*'s health, and that the assured seeking to enforce it could not aver that there was no such declaration: further, that, by acting on the policy containing a recital that there was such a declaration, the assured had concluded themselves from denying that there was such a declaration: further, that the evidence of usage was inadmissible: and for these reasons that there should be a new trial.

Wightman J. thought that the assured, by acting on the policy containing the recital, had not concluded themselves from denying that there was such a declaration; but that they

under the seal of the defendants, whereby, "after reciting that the said trustees of the said Association were desirous of effecting an assurance with the defendants, upon the life of *Gaspard Gabriel Gillion Alfred Count D'Orsay*, in the sum of 1500*l.*, and also reciting that the said trustees had caused to be delivered into the office of the defendants a declaration or statement in writing signed by them, bearing date the 21st day of *November* then last, setting forth the age, and the past and present state of health, and other circumstances touching the habits of the life of the said person, on whose life the said assurance was to be effected, which alleged declaration, so far as it respects the age of the said person, was thereby recited to be admitted to be correct; and also reciting that the said trustees had agreed that the said alleged declaration or statement should be the basis of the contract between them and the defendants;" and reciting the payment of 65*l.* 2*s.* 6*d.* as a premium: it was by the policy agreed that the defendants insured to the trustees, for twelve calendar months from the day of the date thereof, the life of *Count D'Orsay* for 1500*l.* "And it was in and by the said policy provided that, if any thing averred by the said trustees in the alleged declaration so recited as aforesaid, and alleged to have

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had made such weighty evidence against themselves that it was misdirection not to urge this very strongly to the jury. And for this reason he held that there should be a new trial.

Coleridge J. thought that the name attached to the paper in question might or might not be a signature to the whole paper, and that it was a question for the jury whether it was so or not: that this question was properly left to the jury, and that, if it was for the Court to construe the declaration, he

should construe it in the same way as the jury; and that, the evidence of custom having been admitted without objection, it was not material to consider whether it was admissible or not: and that the recital, being only by the defendants, did not conclude the assured. He therefore held that the verdict should stand.

Lord Campbell C. J. thought that, the writing being imperfect and ambiguous, so that there was some question for the jury on it, it became a question for them to construe the whole; that, if the intention had been to represent that there was such a statement, there would have been an estoppel, but, if there was no such intention, the defendants' recital did not estop the other side: that the evidence of custom was not irrelevant: and, supposing it to be a question for the Court, that the conclusion to which the jury had come was right. He therefore held that the verdict should stand.

The rule dropped.

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been made by them, was untrue, that the policy should be null and void, and all premiums and other moneys paid in respect thereof should be forfeited to the defendants." The declaration then set out the rest of the policy, which is not material to the questions discussed. Averment: that all conditions necessary to entitle plaintiff to receive the money insured thereby in the events therein mentioned have been performed and fulfilled. Further averment: that the "trustees did not, nor did the said Company, in any manner aver or declare to the defendants anything that was untrue, in any declaration in writing or otherwise howsoever." Averment of interest in the assured and of the death of Count *D'Orsay* within the twelve months. Breach, non-payment of the sum assured according to the policy.

2nd count for money had and received, and interest.

Plea to 1st count. "That the said trustees, and the said Company, did aver and declare to the defendants, in the said declaration mentioned in the said policy as agreed to be the basis of the said contract, something that was untrue; that is to say: That, at the time of the delivering of the said declaration into the office of the defendants, the said *Gaspard Gabriel Gillion Alfred Count D'Orsay* was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas, on the contrary thereof, the said *Gaspard Gabriel Gillion Alfred Count D'Orsay* was not then in a good state of health, but was then afflicted with a disease or disorder tending to shorten life."

As to the residue of the declaration: Never indebted.

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Replication, taking issue on both pleas.

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On the trial, at the *London* sittings after last *Trinity* Term, before Lord *Campbell* C. J., it appeared that, in 1850, *The Britannia Life Assurance Company* was divided into two Companies: one of them was the Company, now plaintiffs in this action, called *The Britannia Mutual Life Association*. On the division of the two Companies, *The Britannia Mutual Life Association* took, as part of their share of the property, five life policies, executed by *The Britannia Life Assurance*, on the life of *The Duke of Beaufort* for 5000*L.*, on that of Mr. *Brooke* for 5000*L.*, on that of Mr. *Odgen* for 5000*L.*, on that of Count *D'Orsay* for 4500*L.*, and on that of Mr. *Cowan* for 4000*L.*

The Britannia Mutual Life Association had resolved not to run a greater risk on any one life than 3000*L.* Mr. *Foster*, the nominal plaintiff, who was manager, was therefore directed to reinsure the surplus above that sum on each of these five lives above mentioned. He accordingly offered the five reinsurances to *The Medical Invalid Office*, the managers of which objected to *The Duke of Beaufort's* life as being hazardous, and would not insure him under 30*L.* 16*s.* per cent., but were willing to take the other four at the ordinary rate. *Foster* then offered them to the manager of the defendant's office, stating verbally what had passed at *The Medical Invalid Office*; he said, that the whole five must be taken together; that, as *The Duke of Beaufort's* life was a hazardous one, 20 per cent. pre-

1854. mium would be paid for insuring the 2000*l*. on his life,

FOSTER but that the others must be taken at the rate of ordinary
v. lives of their respective ages. He gave the addresses of
MENTOR three of the lives insured, but said that Mr. *Brooke's*
Life Assurance address was not known at *The Britannia Mutual Life*
Company. *Association*, and that if *The Mentor Life Assurance*
wished to make enquiries about him they must find him
for themselves; and that Count *D'Orsay* was then in
Paris; but that every particular about him was well
known in *London*, and the Count was notoriously a first
class life.

At the same time he left with *The Mentor Life Assurance Company* all the papers relating to the original insurances of the five lives in question with *The Britannia Life Assurance Company*.

After this, five papers relating to the five assurances were sent over from the office of *The Mentor Life Assurance Company*, to that of *The Britannia Mutual Assurance Company* and returned. That relating to the assurance on the life of Count *D'Orsay* was, when given in evidence, as follows.

Mentor Life Assurance Company, 2, Old Broad Street.

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Proposal for Assurance.

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Questions.

Answers.

1. Name, Residence and Description of Party proposing Assurance? } *Trustees of the Britannia Life Assurance Company.*
2. Name, Profession or Occupation, and Residence of Party whose Life is to be assured? } *Gaspard Gabriel Gillion Alfred Count D'Orsay.*
3. Amount and Term of Assurance, and according to which of the printed Tables it is to be effected; if according to Table I., whether the premium is to be payable Annually, Half-yearly, or Quarterly? } *£1500. Table I. Whole Life.*
4. Place and date of Birth, and Evidence of Age? - *Paris 4th February 1801.*
5. Age next Birthday? - - - - - *51.*
6. Whether Married or Single? - - - - -
7. If had the Small Pox, or undergone Vaccination? - - - - -
8. If suffered from habitual Cough, Spitting of Blood, Asthma, or any disease of Chest or Lungs? }
9. If ever suffered from Apoplexy, Palsy, Insanity, Epileptic or other Fits, Droopy, Rupture, Gout, Rheumatism, or any other disease tending to shorten life? }
10. Whether of sober and temperate habits? - - - - -
11. Whether of active or sedentary habits? - - - - -
12. Whether liable to any hereditary disease? - - - - -
13. Whether employed in the Naval or Military service? - - - - -
14. If resided abroad state when, where, and how long? - - - - -
15. If there be any circumstances connected with health, habits, or otherwise, calculated to render an Assurance of Life more than usually hazardous? }
16. Whether the party has ever made a proposal for Assurance at this or any other office, and if so, what was the result of each such application? }
17. The name and residence of the ordinary Medical Attendant, and how long known to him? - - - - -
[If the Party cannot refer to a Medical Man the reason must be so stated in the answer, and in that case the Party must refer to two Private Friends.]
18. If recently received advice from any other person or persons, give the name and address of such? }
19. The name and residence of an intimate friend, not being a relative or interested in the Assurance, and how long known to him? - - - - -

For these Particulars see Copies of Britannia Papers attached.

E. R. Foster,
Resident Director.

21st Nov 1851.

DECLARATION.

I, *Count D'Orsay*, above designed, do hereby declare that I am at present in a good state of health, and am not afflicted with any disease or disorder tending to shorten life; that the above statement of my age, health, and other particulars, is true; and that I have not withheld or concealed any circumstance tending to render an Assurance on my Life more than usually hazardous; and *We the Trustees of the Britannia Life Assurance Company* (the parties in whose favour the Assurance is to be granted) do hereby agree that this Declaration shall be the basis of the Contract between us and the *Mentor Life Assurance Company*; and that if any untrue averment is contained in this Declaration, or in the answers above given, all sums which shall have been paid to the said Company upon account of the Assurance made in consequence thereof shall be forfeited, and the Assurance be absolutely null and void.

Signed at _____ this *twenty first* day of *November* in the year of our Lord One thousand eight hundred and *fifty one*.

Signature of Party whose life is to be Assured - - - _____

Signature of Party in whose favour Policy to be granted _____

Witness _____

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Those parts of the above document that are in Roman characters were in the original printed. It was admitted that the parts of it which are printed in italics (with the exception of the words "*E. R. Foster, Resident Director*") and the bracket uniting several questions were written upon it before it was sent from *The Mentor Life Assurance Company's* office to that of *The Britannia Mutual Life Assurance Company*, having been filled up by some of the clerks in *The Mentor Life Assurance Company's* office. The words "*E. R. Foster, Resident Director,*" were written across it by Mr. *Foster*, the nominal plaintiff, who was in fact the resident director; and then it was sent back to *The Mentor Life Assurance Company*. It was not very clear on the original whether the bracket was intended to include the 6th and 19th question as well as those between them, or not; but nothing turned upon this. The four other papers were, mutatis mutandis, similar, but relating to the other four lives. The *Britannia* papers, of which copies were attached, were the papers on which the original insurances were granted.

The original policy on the life of Count *D'Orsay* had been granted in 1845. Amongst the papers relating to it was a paper of questions very similar to those above set out, to which were answers signed by Count *D'Orsay*, and by the original insurer, and there was also a report, by the medical referee of *The Britannia Life Assurance*, on the state of the Count's health. These gave a most favourable account of his health and constitution. On the face of them all these papers represented the state of things in 1845, when the original policy was granted. It was not disputed that, in 1845, and down to a short time before *November 1851*, Count

D'Orsay had been a remarkably eligible life, and that both parties supposed that he still continued so. But in fact, before 21st *November* 1851, the Count was already suffering under a mortal disease of which he afterwards died. The defendants accepted the five reassurances proposed to them; and they executed five deeds poll. These were printed forms, the blanks of which were filled up.

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The policy on Count *D'Orsay* commenced: "Whereas [*William Bridgett, John Drewett and James Foster, Trustees of The Britannia Mutual Life Assurance Association, Princes Street, in the city of London,*] the persons assured by this policy are desirous of effecting an assurance with *The Mentor Life Assurance Company*, upon the life of [*Gaspard Gabriel Gillion Alfred Count D'Orsay*] in the sum of [1500*l.*]. And the said assured have caused to be delivered into the office of the said Company a declaration or statement in writing, signed by them, bearing date the [21st day of *November* last], thereby setting forth the age and the past and present state of health and other circumstances touching the habits of life of the said person, on whose life the assurance is effected, which declaration so far as it respects the age of the said person is hereby admitted to be correct, and the said assured have agreed that the said declaration shall be the basis of the contract between them and the said Company." The parts between [] were filled up in writing; the rest was printed. It is unnecessary to set out the rest of the instrument, the effect of which corresponded with that set out in the declaration.

The Mentor Life Assurance Company then received payment of the five premiums, amounting in the whole to 649*l.* 10*s.* 10*d.*, in one cheque. After the Count's

1854. death, it appeared that in *November*, 1851, his life was not insurable. The defendants resisted payment on the ground that the paper signed by Mr. *Foster*, above set out, amounted in legal effect to a declaration by the assured, on 21st *November* 1851, as to the then present state of health of the Count. At the trial, both sides examined witnesses as to a supposed custom, in cases of reinsurance, to confine the warranty on the part of those reinsuring to the state of health at the time of the original insurance, and to leave the reinsurers to enquire for themselves as to whether it had continued unaltered. The evidence on this head did not amount to much, as reinsurances of this kind did not appear to be common; but there was some evidence of such custom.

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The Lord Chief Justice expressed his opinion to be that the question, whether the paper of *November* 1851 was a signed statement as averred in the plea, was not a pure question of law for the Judge. He gave the defendants leave to move to enter a nonsuit if there was no evidence, and directed the jury to find a verdict for the defendants if they believed that the intention of the parties was that the paper of 21st *November* 1851 was to be understood as a statement, on the part of the insured, that Count *D'Orsay* was at that time in good health; but that they should find for the plaintiff if they thought the intention was that the paper was to be understood as a statement on the part of the assured that the state of health of the Count, at the time the original policy was effected, was shewn by the *Britannia* papers, to which the defendants were referred, and that the defendants might make any further enquiries they pleased.

He directed them, in framing their verdict, to consider

the whole of the circumstances; the evidence of custom as to reinsurance; the form of the policy, which was partly printed, partly written; the manner in which the printed proposal had been filled up before Mr. *Foster* affixed his name; the way in which that name was, by the bracket, apparently confined, as a signature, to the reference to the *Britannia* papers; and the fact that there were several blanks not filled up. He expressly told them that if the question was one of law their finding would be reviewed, but that if it was one of fact their verdict would be final: at the same time he did not conceal that in his opinion the weight of evidence was much in favour of the plaintiff. Verdict for the plaintiff.

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Sir *A. J. E. Cockburn*, Attorney General, in last *Michaelmas* Term, obtained a rule Nisi to enter a non-suit, pursuant to the leave reserved, or for a new trial on the ground of misdirection, or that the verdict was against the weight of evidence. In the same Term (a),

Willes shewed cause (a). The only question at the trial was whether there was a warranty, on the part of the plaintiff's Company, that Count *D'Orsay* was in good health in *November* 1851. The plaintiff disclaims making any point on the ground that the whole directors or trustees do not sign: the Company agree that whatever Mr. *Foster*, the managing director, warranted or signed is to be taken as if warranted or signed by the whole directors, or trustees. The question is therefore reduced to this: Whether the paper of 21st *November* 1851 was a warranty by Mr. *Foster* that Count *D'Orsay* was then in good health.

(a) *November* 16th. Before Lord Campbell C. J., Coleridge, Wightman and Erie Js.

1854. It is urged that the policy is conclusive on this matter: but that is not so. The recital there is, that there was a declaration in writing. The first enquiry, in all cases in which a written document refers to something extrinsic, is what is the particular thing referred to, a question to be answered by evidence. In the present case there can be no doubt that the recital referred to the paper which has been produced in evidence. Then comes the question, What is the nature of the thing referred to? That depends, not upon the description contained in the referring document, but on the thing itself. If it answers all the description it is well; if not, the inaccurate parts of the description are *falsa demonstratio*, and as such must be rejected. Here *constat de documento*: the paper is the one produced. Does it answer all the description in the policy? That is, is it signed by the assured, and is it touching the then present state of health of Count *D'Orsay*, or is there misdescription in these respects? To answer that, the paper itself must be looked to. If there had been no name at all attached to the paper, it could not have been said that the recital proved that it was signed. There is here a name attached; and the question is whether that was a signature to the whole paper, or not. And the first point is, whether that was a question for the Court or the jury. It may be admitted that a name attached to a written instrument is, *primâ facie*, to be taken as a signature authenticating the whole of what appears on the face of the instrument; but it cannot be doubted that a name may legally be applied as the signature to part only; and, on the face of this instrument, the name written as it is at the foot of a particular sentence, "For these particulars

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see copies of *Britannia* papers attached," purports to be intended to apply to the reference, and to that only. If it does not so purport it is, at the least, an imperfect, and ambiguous instrument, and the intention to affix the name as a signature to the whole is not clear. That is enough to make it a subject of enquiry, by means of circumstances dehors the instrument, what *Foster* intended to sign; which must be a question for a jury. In *Wigglesworth v. Dallison* (a), and a long series of cases collected in Mr. *Smith's* notes to that case (b), it is established that a custom of trade is admissible as evidence to explain or add incidents to an imperfect document. It was therefore admissible in the present case: and, it having been received, there could not be a nonsuit, as the effect of it was for the jury; *Moore v. Garwood* (c). If there was a question for the jury, it could be no other than the one put.

As to the verdict being against evidence: any one, looking at the whole circumstances, would come to the conclusion to which the jury have evidently come, viz. that the printed forms were irregularly used in a transaction to which they were not applicable. It is a strong fact that, if there was a declaration that Count *D'Orsay* was in good health, there was also a declaration that *The Duke of Beaufort* was in good health; for the same form was used in his case. Yet in *The Duke of Beaufort's* case 20*l.* per cent. premium was paid, because he was known not to be in good health.

It is said that the recital in the policy operates as an estoppel on the plaintiffs. It must be admitted that, if it appears that the parties have agreed to proceed on a

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(a) 1 *Doug.* 201.(b) 1 *Smith's Leading Cases*, 305.(c) 4 *Exch.* 681.

1854. contract that some fact shall, as between them, be considered to exist, and that they shall act on the faith of that agreement, there is an estoppel. And such an agreement may be shewn by a recital. But in the present case the recital, by the defendants in their own deed, does not shew that the assured, who are not parties to the deed, ever agreed that a declaration should be taken as made: and, unless the defendants can go so far as to say there was such an agreement, there can be no estoppel.

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Sir *A. J. E. Cockburn*, Attorney General, and *C. W. Wood*, contra. The recital in the policy is that there has been a signed declaration touching the Count's present health which the assured have agreed to take as the basis of the contract. The assured receive that policy with that recital, pay the premium, and induce the defendants to become assurers on the faith that this recital is acceded to. They are therefore concluded from denying that there was such a declaration; *Pichard v. Sears* (a). If their conduct was not absolutely conclusive, it was at least so nearly conclusive that the verdict is against evidence.

Supposing the question to be open, it was a question for the Judge, not for the jury. A signature may be written in any part of a document, and yet apply to the whole; *Knight v. Crockford* (b), *Saunderson v. Jackson* (c). That being so, the Judge, as a matter of law, ought to have decided that the signature of *Foster* applied to the whole. It was therefore a misdirection to leave any thing to the jury.

Cur. adv. vult.

(a) 6 *A. & E.* 469.

(b) 1 *Esp. N. P. C.* 190.

(c) 2 *B. & P.* 238. See *Lobb v. Stanley*, 5 *Q. B.* 574.

In this term (*January* 30th), the Court being divided in opinion, the learned Judges delivered judgments seriatim.

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Wightman J

WIGHTMAN J. This was an action by the plaintiff, representing *The Britannia Mutual Life Association*, against the defendants, upon a policy of assurance upon the life of Count *D'Orsay*. The declaration was in the usual form, reciting the policy, and that the trustees of the assured had caused to be delivered into the office of the defendants a declaration in writing, *signed by them*, setting forth the age, and past *and present* state of health, and other circumstances, touching the habits of life of the person on whose life the assurance was to be effected; and that, if any thing averred by the said trustees in the said declaration was untrue, the policy should be null and void. It was then averred that the said trustees did not, in any manner, declare to the defendants, in any declaration in writing or otherwise, any thing that was untrue. The defendants pleaded, that the trustees *did declare to the defendants*, in the declaration mentioned in the policy, something that was untrue, that is to say, *that at the time of delivering the said declaration into the office of the defendants the said Count D'Orsay was in a good state of health*: and issue was taken upon the allegations in the plea.

There was no doubt but that, at the time the declaration was delivered at the defendants' office, Count *D'Orsay* was *not* in good health, but was affected by the disease of which he died soon after; and the only question at the trial was, whether the trustees, in the declaration mentioned in the policy, represented Count *D'Orsay* to be *then* in a state of good health, that is, at the time of delivering the declaration to the office of the

1854. defendants. It appeared, by the evidence at the trial, that the declaration referred to in the policy was not in fact signed by the trustees, but by the plaintiff, who was the resident Director of *The Britannia Mutual Life Association*. It was however hardly disputed but that *Foster* was the agent of the trustees for the purpose of the declaration, and that what he did and signed upon that occasion bound *The Britannia Mutual Life Association*, and the trustees, as fully as if they had acted and signed themselves. Assuming, then, that the signature of *Foster* pledged the Company, as completely as if the trustees had themselves signed the declaration, the question is, What did *Foster* sign, and to what did he pledge the trustees, and *The Britannia Mutual Life Association*? The document, which is called a declaration, is in two parts; the first being a series of nineteen questions to be answered by the persons to be assured; and the second a declaration to be made by the person whose life is to be insured, that he is, *at the time of making the declaration*, in a good state of health; with a further declaration by the parties to be assured, that, if the preceding declaration or their answers to the questions be untrue, the insurance will be void. Both parts of the document are on the same side of one sheet of paper. The assurance proposed to be effected by *The Britannia Mutual Life Association* with the defendants was in fact a reinsurance, *The Britannia Company* having, in 1845, granted a policy of assurance upon the life of Count *D'Orsay* to a larger amount than that which they proposed to assure with the defendants. When the proposition to assure was made, the defendants sent to *The Britannia Mutual Life Association* the document in question partially filled up by themselves:

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they had, from their own knowledge, given the answers to the first five questions; but the twelve following questions were included in a circumflex, against which was written, at the side of the paper, "For these particulars see copies of *Britannia* papers attached;" and, at the foot of these words, the plaintiff *Foster* signed his name, but no where else. The blank, left for the signature of the person, whose life is to be insured, to the declaration to be made by him, was not filled up, nor was it signed by Count *D'Orsay*; nor was the blank left for the signature of the party to be assured, vouching for the truth of the declaration and of the answers to the questions, filled up, but remained in blank, as when sent by the defendants to the plaintiff's office. The real question upon the issue was, whether *The Britannia Mutual Life Association* had, in the document referred to in the policy, represented Count *D'Orsay* as being in good health *at the time of delivering that document to the defendants*. But, to determine this question, it seems to have been considered necessary to determine a previous one, namely, Whether the party signing the document intended his signature to be to the whole, or only to the part against which it was placed; and this was the question, in substance, which was left to the jury; and the point now to be determined by us is, Whether, in our opinion, there was any misdirection in the manner in which that question was left to the jury, or in the leaving it to them at all.

The defendants, by the recital in the policy, shew that they considered that the trustees, by the signature of *Foster* in the place where it was in the document, did make a declaration as to the *then existing state* of health of Count *D'Orsay*; and, as *The Britannia Mutual Life*

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1854. *Association* accepted the policy with that recital in it, without denial or explanation of it, and the action is brought upon the very instrument containing the recital, one question, and that a most important one in this case, is, whether they are not bound by it, and concluded from denying now that they did make a declaration of the then present state of Count *D'Orsay's* health. The document referred to, if the signature is to be taken as applicable to the whole, is not incapable of such a meaning: and, if it may be so construed, and *The Britannia Mutual Life Association* have, by allowing the defendants to deal with them as if it was to be so construed, assented to such construction, and by means of it have obtained that which the defendants might not otherwise have been disposed to give them, it appears to me, upon the principle of the decision of *Pickard v. Sears* (a) and some later cases founded upon it, that *The Britannia Mutual Life Association* are, *prima facie*, concluded, and cannot be allowed now to deny that they did mean the declaration to apply to the existing state of Count *D'Orsay's* health, or that the signature by *Foster* applied to the whole document. But, though in some sense *The Britannia Mutual Life Association* may be said to be concluded by the recital, it is not an estoppel, nor a conclusion in point of law; it may have been founded on mistake or be capable of explanation; and I do not think that there is enough to warrant a rule absolute for a nonsuit. But it appears to me that the circumstance of *The Britannia Mutual Life Association* having accepted the policy with that recital was not sufficiently, if at all, pressed upon the

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(a) 6 A. & E. 469.

attention of the jury; and that upon that ground, and without reference to the other points taken upon the motion for the rule, there should be a rule absolute for a new trial.

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Erle J.

ERLE J. Assuming the pleadings and evidence to be as stated by my brother *Wightman*, I have come to the conclusion that the plaintiff's case failed at the trial on several grounds.

As he sues upon a written contract, he is a party to it, as much as if he had signed it, and cannot by parol evidence contradict or alter the stipulations therein. In that written contract, namely the policy, it is stipulated that the plaintiffs had delivered in to the defendants a declaration in writing, setting forth, *inter alia*, the present state of Count *D'Orsay's* health, and that, if the declaration was untrue, the promise of the defendants was void. The parol evidence was offered to shew that the plaintiffs had not delivered in to the defendants any such declaration in writing, so setting forth the present state of the health of Count *D'Orsay*. It seems to me that the attempt was thereby to contradict the written agreement, and to alter the promise of the defendants from conditional to absolute. The question of signing is only material to identify the alleged declaration. When the paper containing it was identified, the question of signature was not of the essence of the stipulation: but the question of such a declaration so setting forth the present state of Count *D'Orsay* was material, and could not be denied by the plaintiffs.

If the stipulations are changed into the form of an executory agreement, the declaration might run thus: "In consideration that the plaintiff would deliver such

1854. a declaration, and would undertake it was true, and
 FOSTER would pay a premium, the defendant promised to insure.”
 v. The plaintiff could not recover on such a contract,
 MENTOR without averring that he had delivered such a declara-
 Life Assurance tion, and that it was true; and, if the stipulations of the
 Company. deed are analyzed, the delivery of such a declaration will
 Erle J. appear to be equally indispensable for the plaintiff; and,
 if he delivered none such, the defendants' promise did
 not attach, and the plaintiff would fail.

Supposing this ground not to be tenable: I am further
 of opinion that the plaintiffs were concluded from setting
 up at the trial that they had not made such a declaration.
 The defendants sent to the plaintiffs for signature such
 a declaration, so setting forth the state of Count
D'Orsay, and received it back with a signature at the
 side; and the defendants recited in their contract that
 the plaintiffs had delivered in such a declaration, and
 that they acted on the fact so recited; and they promised
 only on condition it was true. The plaintiffs, by accept-
 ing that promise, induced the defendants to act on the
 belief that the declaration had been so delivered in as
 recited; and plaintiffs obtained the deed by reason of
 that belief: then, in claiming a benefit under that deed,
 they are concluded from denying the fact which the
 defendants informed them was the basis of their pro-
 mise. The case of *Pickard v. Sears* (a), and many
 cases founded thereon, have carried this doctrine much
 further than is required for the purpose of the present
 defendants. The effect of the words “concluded from
 denying” has never been settled. Perhaps the effect is
 that the principle ought to be explained to the jury, and

(a) 6 A. & E. 469.

they should be told as matter of law that, as against the party who authorized the belief, they are bound by law to find the fact to be as the opponent under the supposed circumstances believed, and if they found otherwise to set aside the verdict. But, whatever be the correct mode of acting on that principle, it was not brought forward at all on the trial.

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I would further observe that the evidence of other contracts made by other offices was inadmissible, as irrelevant towards proving the meaning of the contract made between these parties. The contracts which other offices have made are not evidence against the *Mentor* to prove this contract. If it be admitted, none would seem to be at all applicable except reassurances after an equal interval from the original assurance, as of course the probability of an alteration in the risk, and the need of a fresh declaration, is in direct proportion to the length of that interval. Of such reassurance there was to my mind very little satisfactory evidence.

After the course pursued at the trial, I am not prepared to say that a nonsuit should be entered now, though it appears to me that the only two questions for the jury must be answered for the defendants, and the construction of the written instruments must also be in the defendants' favour. But I am of opinion that the verdict for the plaintiffs ought not to stand, and that therefore the rule for a new trial should be absolute.

COLERIDGE J. In this case three points are made for the defendants. First: that they were entitled to enter a nonsuit. Secondly: that the jury were misdirected. Thirdly: that the verdict for the plaintiff is contrary to or against the weight of evidence. It is necessary, with

Coleridge J.

1854. a view to the decision on each of these points, to look to the
 FOSTER declaration and issue as well as the evidence in the cause.
 v. It is an action by the trustees of *The Britannia Mu-
 MENTOR tual Life Association* against *The Mentor Life Assurance
 Life Assurance Company.* *Company*, to recover upon a policy, effected by the
 Coleridge J. former with the latter, on the life of Count *D'Orsay*.
 In the declaration, stating that such policy had been ef-
 fected, the plaintiffs state that it was therein recited that
 they had caused to be delivered into the defendant's
 office a declaration or statement in writing signed by
 them, bearing date 21st *November* then last, setting forth
 the age and past and present state of the Count, and
 other circumstances touching his habits of life; and that
 they had agreed that the said declaration or statement
 should be the basis of the contract between them. The
 declaration also sets out a provision in the policy, that,
 if anything averred by the trustees in the alleged decla-
 ration so recited, and alleged to have been made by
 them, was untrue, the policy should be null and void.
 The declaration also contains an averment that the said
 trustees did not, nor did the said *Britannia Mutual Life
 Assurance Association*, aver or declare to the defendants
 anything that was untrue, in any declaration in writing,
 or otherwise howsoever.

The defendants plead that the trustees and the as-
 sociation did aver and declare to the defendants, in the
 said declaration mentioned in the said policy as agreed
 to be the basis of the said contract, something that was
 untrue, that is to say, that, at the time of the delivery
 of the said declaration into the office of the defendants,
 the said Count *D'Orsay* was in a good state of health,
 and was not afflicted with any disease or disorder tend-
 ing to shorten life; whereas he was not then in a good

state of health, but was then afflicted with a disease and disorder tending to shorten life. The plaintiff takes issue on the whole plea.

Three questions are involved in this issue. Did the trustees deliver a signed declaration? Did that declaration state Count *D'Orsay* to be at the time of such delivery in a good state of health, free from any disorder tending to shorten life? If such declaration were delivered containing such statement, Was that statement true? And it is not denied that in fact it was untrue: so that the substantial questions for determination at the trial were reduced to the first two.

Upon the trial it appeared that the policy in question was one of reinsurance, effected in *December* 1851, for 1500*L*, the original policy for a larger amount having been effected in 1845. That this was one of five policies of reinsurance offered to the defendants together, all or none to be accepted, on five several lives. Some parol information was given as to each; and the Count's was represented as a notoriously first class life. It was shewn that the defendants had given to the plaintiff a paper headed in the upper part "Proposal for Assurance;" in the lower, but on the same side, "Declaration." The part headed "proposal" contained nineteen questions with blank spaces left for the answers; these questions were the ordinary ones, as to the age, condition, health, past and present, the having, or not having had, certain specified disorders, the habits and medical attendant of the life to be insured, the having, or not, received recently advice from any other person, and required the name and residence of some intimate friend. To the first five questions, which had no reference to health, or habits, or medical advisers, specific answers

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1854. were given on the paper: all the succeeding questions, excepting the last as to the intimate friend, appeared to have been inclosed within a circumflex; and across the blank space opposite them was written "For these particulars see copies of *Britannia* papers attached:" and, under this, came the signature of the plaintiff, "*E. R. Foster*, Resident Director, 21st Nov. 1851." No answer was given to the nineteenth question. Under the part headed "Declaration" came first a statement with a blank which was filled up in writing with the words "Count *D'Orsay*," and which purported to be a declaration by him that he was then in a good state of health, and was not then afflicted with any disease or disorder tending to shorten life; that the above statement of his age, health and other particulars was true, and that he had not withheld or concealed any circumstance tending to render an assurance on his life more than usually hazardous. Secondly followed "And we the trustees of *The Britannia Life Assurance Company*" "agree that this declaration shall be the basis of the contract between us and *The Mentor Life Assurance Company*; and that if any untrue averment is contained in this declaration, or in the answers above given," the assurance shall "be absolutely null and void."

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Then came the words:

"Signed at _____ this 21st day of *November* in the year of our Lord 1851.

Signature of Party whose life is to be assured _____

Signature of Party in whose favour policy is to be granted _____

Witness _____."

None of these blanks were filled up. The defendants contend that this paper, upon admission of the plaintiff's

handwriting, and of its delivery to the defendants, presented no question, except for the Judge, and that he was bound so to construe it that a nonsuit thereon ought to have been entered, or a verdict for the defendants, upon these grounds, substantially, that, it being immaterial on which part of a paper the party to be charged by it signs his name, the plaintiff's signature must be taken conclusively to apply to the whole paper; and that the reference to the *Britannia* papers attached did not import that they were to be looked to only to ascertain what the state of Count *D'Orsay's* health and habits were in 1845, when they had been given, but brought down those answers to the then present time.

Now, as to the first of these points: I apprehend it cannot be laid down, simply and without qualification, that it is immaterial in what part of a paper you find the signature of the party to be bound by it: it is rather true to say that, if you find it at the foot of the matter written, it is to be taken conclusively to apply to the whole, unless there be something expressly to rebut that presumption; and that, if you find it any where else, it *may* apply to the whole, if upon the evidence you find that the party signing so intended. Where the intention to sign is found, and the signature is so placed as apparently to apply no more to one part than another, there can be no reason *primâ facie* to consider it otherwise than as intended to apply to the whole; but, where the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question whether it applies to all or only to that one portion is still purely one of intention. Now, wherever that question arises, it must be for the jury. These principles I think may be collected from the decisions on the

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1854. Statute of Frauds both as to wills and contracts. Thus in
 FOSTER *Right, lessee of Cater, v. Price (a)*, where a testator had
 v. signed the two first sheets of his will, and attempted to
 MENTOR sign the third, but from weakness could not do it, this was
 Life Assurance held no execution: Lord *Mansfield* said that the testator,
 Company. “when he signed the two first sheets, had an intention of
 Coleridge J. signing the others, but was not able. He therefore did *not*
mean the signature of the two first as the signature of the
whole.” But in *Winsor v. Pratt (b)*, where a will on one
 sheet concluded by stating that the testator had signed
 his name to the two first sides and put his hand and seal
 to the last side, and he did put his name and seal to the
 third side at the end of the will, but did not sign his
 name to the two first sides, the Court, supporting the
 execution, recognised the preceding case, and distin-
 guished it. “There,” said *Dallas C. J.*, “the *intention*
 of the testator was defeated by incapacity; here, the act
 of the testator points to nothing prospective; and, what-
 ever might have been his intention at one time of signing
 the former sides, he has by his final signature abandoned
 that intention.” Again, in *Johnson v. Dodgson (c)* the
 defendant, being the buyer of hops, wrote in his own
 book a *sold* note beginning “Sold *John Dodgson* ;” and
 this, at his request, the seller’s traveller signed. In an
 action for goods sold and delivered this was held a good
 signature by the party charged, Lord *Abinger* saying:
 “The cases have decided that, although the signature
 be in the beginning or the middle of the instrument, it
 is as binding as if at the foot of it; the *question being*
always open to the jury, whether the party, not having
signed it regularly at the foot, meant to be bound by it as

(a) 1 *Dougl.* 241.(b) 2 *B. & B.* 650.(c) 2 *M. & W.* 653.

it stood, or whether it was left so unsigned because he refused to complete it." The cases in which a printed name has been held a good signing are to be supported on the same principle; and the intention is inferred from the habit, or from other circumstances to be found in them. If then this was a question of intention, and there was any evidence of intention, the learned Judge could not properly withdraw it from the jury: and it seems to me that there was such evidence in the circumstances of the whole transaction. For this was not an ordinary case. Five lives were offered in the lump: one was confessedly a bad life; with regard to three some special information was afforded; and, as to one of these, Mr. *Brooke*, his absence precluded the ordinary references. As to the life in question, he was honestly represented as so notoriously good a life that the ordinary enquiries may well have been deemed unnecessary. He too was abroad; and it was probable he would not have troubled himself to answer questions, having no interest in the policy being effected. Altogether it was a case of circumstances from which a jury was to determine whether there was an intention by the signature, found where it appeared on the paper, to sign and be bound by the whole instrument. In the light in which I view the case, as standing on its own peculiar circumstances, I do not rely on the evidence of usage. It seems to me rather that it was not one on which the evidence was admissible; and the evidence in fact admitted appears to me to have amounted to nothing of any substance. But this is not material upon the present rule; the first ground for which I think fails for the reasons given.

Secondly. As to the direction. Supposing the ques-

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1854. tion of signature to have been for the jury, I do not see
 FOSTER how it could have been properly left to them, except as
 v. one of intention, to be collected from the paper itself,
 MENTOR and all the circumstances stated by the witnesses; and
 Life Assurance this I understand to have been in substance what was done
 Company. at the trial. It is not inconsistent with this, that a question
 Colridge J. of construction as to part may have been mixed up, as
 to which the Judge was to give his opinion; and, if he
 gave the jury what appears to us a wrong opinion, that
 might amount to a misdirection. On more grounds than
 one, it was certainly important for the jury to know
 what was the meaning of the answer to the questions
 included within the circumflex. Did it relate to the
 Count *D'Orsay's* state in 1845, or in 1851? Undoubt-
 edly the words may admit of either interpretation. The
 learned Judge thought that the former was the true one;
 and, after much consideration and some doubts, I am
 not prepared to say that he was wrong. It is impossible,
 I apprehend, to form an opinion upon this without
 reference to the circumstances under which the words
 were used. These do not lead me to believe that the
 plaintiff intended to warrant a continuance, at the date
 of this policy, of all those particulars stated in the
 answers of 1845, but only that the particulars were true
 at the time when they were stated. Upon the general
 question whether the whole paper was signed, it was
 objected that the learned Judge spoke too decidedly.
 Seeing nothing wrong in the opinion he expressed, that
 would be no objection with me, unless he thereby took
 the matter out of the hands of the jury; but, according
 to the notes, that cannot be said. He gave his opinion,
 but put all the facts before them for their consideration.

It only remains upon this point to consider, whether

the circumstances precluded the plaintiff from denying a signature of the whole paper in the sense contended for by the defendants: if they did, the direction was not right. I am clearly of opinion they did not. And this must follow from the conclusions to which I have already come. The argument for the defendants, on this point, is to this effect. The policy, on which the plaintiffs' claim rests, recites that the plaintiffs have caused to be delivered to the defendants a declaration in writing, signed by them, setting forth the past and *present* state of health and other circumstances touching the habits of life of the Count *D'Orsay*: these words are the words of the defendants; but they shew their understanding of the transaction; the plaintiffs allow them to use them; and, on the faith of this, the defendants enter into the contract: the plaintiffs, therefore, cannot now deny that such declaration was made. I should be very sorry to do any thing that should break in upon the wholesome principle laid down in *Pickard v. Sears* (a): but it seems to me that it would be going much beyond that principle if we were to apply it to the facts of this case. What are they? I must now assume that *no such* declaration was in fact made, and that the plaintiffs' proposal for insurance has been accepted on the faith of a different declaration, limited in its extent, and not signed at all; that this fact is known to the defendants as well as to the plaintiffs; and, this being so, that the defendants in the printed part of a policy, using the ordinary words of such policy, knowingly or with means of knowledge, misrecite the plaintiffs' declaration, which misrecital the plaintiffs pass over, accept the policy as

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(a) 6 A. & E. 469.

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worded, and pay the premium. I am not supposing that the binding parts of a policy are to have less effect when printed than when written: but, in applying a principle the foundation of which is natural equity, all the facts of the case are to be looked to; and this is one of them. Now, upon these facts, it seems to me that it would be unjust and unreasonable absolutely to conclude the plaintiffs from denying the truth of this recital. It would be applying a principle framed to advance the ends of justice in exactly the opposite direction. The permitting the misrecital to pass without objection is an argument fairly to be used for the defendants against the plaintiffs' construction; but it is no more, and in my opinion not strong enough to weigh down all the opposing argument.

Upon the remaining question—the propriety of the verdict—I need say nothing in addition to what I have already said on the former points. From this it follows that at least I cannot consider the verdict one which the Court should interfere to set aside. I think therefore the rule ought to be discharged.

*Lord
Campbell C. J.*

Lord CAMPBELL C. J. I am of opinion that this rule for entering a nonsuit ought to be discharged.

The issue was, whether the plaintiff's company did aver and declare to the defendants, in the declaration mentioned in the policy, that, at the time of the delivering of the said declaration into the office of the defendants, Count *D'Orsay* was in a good state of health, and not affected with any disease likely to shorten life. The fact was admitted that, unknown to both parties, Count *D'Orsay*, when the policy was executed, was affected by a disease likely to shorten

life; and the verdict depended upon the proof of the alleged guarantee that he was then in good health.

I conceive that the defendants were bound to produce the document referred to in the recital of the policy, and to shew that, by this document, *The Britannia Mutual Life Association* did give the alleged warranty. If this had depended upon the mere construction of the document, it would have been a pure question of law, and the Judge, upon its being produced and proved, ought to have directed how the verdict should be found, or that the plaintiff should be nonsuited. But, looking at the document, a question of fact arises, whether that part of it which is supposed to contain the guarantee is to be considered as signed by the assured. I cannot think that the recital, by the defendants in the policy, that it was so signed, is binding on the assured. Suppose that no signature had appeared upon any part of it, and that it had been a mere printed form, with none of the blanks filled up, surely the plaintiff would not have been precluded from contending that it was not signed, or from shewing that the defendants had agreed to take upon themselves the risk of Count *D'Orsay* continuing an insurable life. It seems to me, that the doctrine of estoppel does not apply to such a transaction, and that we are bound to see whether in truth the declaration was signed by the Directors, and what it imports.

Looking to the document itself: in the place for "signature of party whose life is to be assured" no signature appears; and in the place for "signature of party in whose favour policy to be granted" no signature appears. On another part of the document there is the signature of one of the directors; but I

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1854. think it is impossible to say, as a matter of law, that the signature applies to that part of the document which contains the unsigned declaration in the name of Count *D'Orsay*. If it had been a question for the Judge, I should certainly have said that *Foster's* signature did not apply to this, and that the document, as it stands, would have no more effect than if that part of it entitled "*declaration*" had had none of the blanks in the printed form filled up in writing, or if this part of the document had been entirely wanting. From the place where *Foster's* signature is found, and the circumflex denoting to what it does apply, with the words above the signature, "For these particulars see copies of *Britannia* papers attached," I should infer that the proposed guarantee as to the present state of health of Count *D'Orsay* was repudiated by *The Britannia Mutual Life Association*, and that the directors of the *Mentor* Company, after having examined the papers shewing Count *D'Orsay's* state of health when the original policy was effected, were left to draw their own conclusions as to his present state of health, and to take the risk of the Count's health continuing good down to the date of the new insurance. Considering the doubt as to whether the declaration be signed as the defendants allege, I likewise think that some regard may be paid to the evidence of usage upon a reinsurance. This was not objected at *Nisi Prius*, nor upon the motion for a new trial; and, if admitted, the jury were to determine what effect it was entitled to. An observation has been made that the evidence was only parol, and that the policies referred to by the witnesses were not produced. But it has often been held that, although the contents of a particular document cannot be proved without its

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being produced or accounted for, a mercantile usage, which refers to written documents, may be established by parol evidence; and, indeed, it could hardly be proved satisfactorily in any other way. Moreover, I conceive that the evidence, given on both sides, of the conversations and conduct of the parties while the transaction was going forward might be taken into consideration in determining whether the declaration was intended to be, and was understood between the parties to have been, signed by *Foster*. If there was any parol evidence, on which the issue was to depend, then, according to the well known rule clearly stated by *Patteson J.* in delivering the judgment of the Exchequer Chamber in *Morre v. Garwood (a)*, the whole was for the jury. I do not know any principle or practice according to which, in this case, the signature of the declaration should have been left to the jury as a separate issue. No question arose, or could arise, for the Judge upon the construction of the declaration; for, if it was signed by the trustees of the *Britannia*, it amounted, and was admitted to amount, to an express warranty, in the very words of the plea, that Count *D'Orsay* was, on the 21st day of *November 1851*, in good health, and was not then afflicted with any disease tending to shorten life. The doctrine of *Pickard v. Sears (b)* and *Freeman v. Cooke (c)*, which we have lately had to consider in *Howard v. Hudson (d)*, would have effectually estopped the *Britannia* Company from denying that they had given the warranty if they had stated that they had signed the declaration; for then they would have made a statement on which the *Mentor*

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(a) 4 *Exch.* 681.(b) 6 *A. & E.* 469.(c) 2 *Exch.* 654.(d) 2 *E. & B.* 1.

1854. Company had acted and thereby incurred a liability to their prejudice. But, if the declaration was repudiated instead of being signed, there had been no statement by *The Britannia Mutual Life Association* which could be the foundation of such an estoppel; for the recital in the policy is a statement by the *Mentor Company* only; and, if the declaration was not signed by the directors of *The Britannia Mutual Life Association*, nor understood so to be, the *Mentor Company* cannot have acted upon any such belief. Indeed they knew full well that Count *D'Orsay* was then abroad, and that there never was any contemplation of his signature being affixed to it; and this was a preliminary to the signature by the party in whose favour the policy was granted. At the trial, the defendants attempted to prove that they granted the policy on the credit of a parol declaration by one of the *Britannia* Directors that "Count *D'Orsay* was a notoriously good life." I am therefore of opinion that the issue resolved itself into a question of fact for the jury, and that we cannot direct a nonsuit to be entered, according to the leave reserved if the Court should think that the Judge ought to have directed a nonsuit at the trial.

It is next contended that there was misdirection in the manner of leaving it to the jury: chiefly on the ground that the Judge used the expression that "the declaration was not signed by the trustees." But, in using that expression, he only gave the jury to understand that no signature was found where it ought regularly to have appeared: and, when the Attorney General interposed during the summing up, suggesting that the writing of Mr. *Foster*, across the document, must be taken to be a signature of the declaration,

the Judge (according to the shorthand writer's note) observed: "I do not think so, because Mr. *Foster* has only signed '*For these particulars see copies of Britannia papers attached;*' but the jury shall see the whole." Accordingly, fac simile copies of the whole paper entitled "Proposal for assurance" were put into the hands of the jury; and their attention was directed to the different parts of it, so that they might form a proper opinion whether the signature was intended, and understood between the parties, to apply only to a part, or to the whole. The signature therefore was left, with the other facts in the case, for their consideration. Nor was any question of law left to the jury which the Judge ought to have determined; for they were not called upon to construe a written document, or to pronounce upon the intention of the parties from the language used.

If it be alleged that the supposed estoppel, or conclusive admission, ought to have been submitted to the jury, I answer, that no such point was made at the trial, and that if it had I think it could not be supported.

The ground of misdirection therefore seems to me to fail.

The remaining question for our consideration is, Whether the verdict was contrary to the evidence? In my opinion it was entirely according to the evidence, and according to the justice of the case. All imputation of fraud was disclaimed by the defendants: and, looking both to the written document and the parol evidence, I think the defendants, as far as the policies on Count *D'Orsay* and three others were concerned, were content to take these lives on the papers on which the

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1854. former policies upon them had been effected, at the
 FOSTER ordinary premium according to the ages which they had
 v. respectively attained, with that on *The Duke of Beau-*
 MENTOR *fort's* life at the extraordinary premium of 20*l.* per cent. :
 Life Assurance Company. receiving, in one cheque for 649*l.* 10*s.* 10*d.*, the pre-
 Lord miums on all the five for the first year, and being satis-
 Campbell C. J. fied to run the risk of any of the four lives having
 become less eligible than when the original policies
 were effected, by circumstances unknown to either
 party.

If the defendants had expected the warranty, one would imagine that they would have objected to the declaration when it was returned unsigned, and would have required it to be signed as upon an original insurance, before they executed the policy. The mere circumstance of their having used the printed form of policy adapted to an original policy, with the printed recital that the declaration had been signed by the assured, is not at all sufficient to induce me to infer that they believed they had obtained a warranty, such as would have been given by regularly signing such declaration as those upon which the original policies had been effected. In construing a policy of insurance the Court certainly cannot consider whether it be in writing or in print, or partly in writing and partly in print: but I think that the jury, in determining the fact, whether the declaration was understood between the parties to be signed according to the recital, would have been perfectly justified in taking into consideration that this policy was in a printed form adapted to an original insurance and not to a reinsurance.

Upon the whole, I am of opinion that a special jury of the city of *London*, gentlemen more familiarly

acquainted with such transactions than we are, have arrived at a right conclusion, and that their verdict ought not to be disturbed.

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The Court being equally divided in opinion, the rule dropped.

JAMES SMITH *against* JAMES TROWSDALE, THOMAS CORBETT JACKSON and THOMAS GARBUTT. *Thursday, January 12th.*

COUNT, setting out the effect of an instrument under the seal of the plaintiff and defendants, whereby, after reciting that plaintiffs and defendants had been partners in a contract with *The Leeds and Thirsk Railway Company*, and that disputes had arisen between the parties, and that it had been arranged that the plaintiff should retire from the partnership upon terms to be settled by arbitration, it was agreed, amongst other things, that plaintiff should retire from the partnership by defendant to plaintiff: that it was awarded that a sum named should be paid by instalments: but defendant had paid only a part thereof.

Plea: that, after breach of the award by nonpayment of the first instalment, it was agreed between plaintiff and defendant that defendant should not assist one B. in a certain claim which he was urging, and that defendant should pay, by instalments on certain days named, the last but one being 14th *April*, a sum in all amounting to less than the sum awarded; which agreement and the performance thereof plaintiff accepted in satisfaction of the sum awarded, and all causes of action in respect thereof, and the said breach: and that defendant paid plaintiff the instalments on the days named in the second agreement, which plaintiff accepted in satisfaction (as before), and in performance of the second agreement.

Held: that the deed of submission was merely inducement, and that the action was brought for breach of the award; and that therefore there might be accord and satisfaction under an agreement by parol, made after the breach by non-payment of the first instalment: and, consequently, that the defendant, in support of his plea, was not bound to shew an agreement under seal.

It appeared that the last payment but one under the second agreement was made on 19th *April*, not on 14th; and that, when it was made, plaintiff refused to accept it except as on account of the money due on the award, which, he contended, was still binding: but he made no objection to the payment as having been made too late.

Held that the defendant had performed the second agreement, the effect of the transaction on the 19th being that the plaintiff agreed to take the payment as made on the 14th.

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nership, that defendants should relieve him from all liabilities, and take to them all the partnership assets; and that "the sum of money to be paid to the plaintiff for retiring from the said partnership as aforesaid, the time or times for payment thereof, and all other matters in difference between the said parties thereto touching the said partnership affairs," should be referred to the arbitrament of two persons named in the deed, or, in case they should differ, to the arbitrament of an umpire to be named by the two arbitrators, whose umpirage and award the parties covenanted to adhere to. There was nothing in the deed requiring the award to be under seal. Averment: that the arbitrators duly appointed *Stephen Robinson* as umpire, and afterwards differed; and that *Stephen Robinson*, in *November 1850*, duly made his award and umpirage in writing, and thereby awarded that defendants should pay plaintiff, for retiring from the said partnership, 5003*l.* 17*s.* 10*d.* in manner following: 2000*l.* on 1st *January 1851*, 2000*l.* on 1st *April 1851*, and 1003*l.* 17*s.* 10*d.*, being the residue, on 1st *July 1851*. Averments of notice, and of the expiration of the time for payment. Breach: that, although defendants had paid the whole of that sum except 503*l.* 17*s.* 10*d.*, they had not paid 503*l.* 17*s.* 10*d.*

Plea: that, "after the making of the said award, and after a breach of the said award in the non-payment of the said first instalment of 2000*l.* of the said sum so awarded to the plaintiff as aforesaid on the day on which the said first instalment was so awarded to be paid as aforesaid, but before any of the said further instalments of the said sum awarded had become due and payable, at the request of the plaintiff it was mutually agreed, by and between the plaintiff and the defendants, that

the defendants should not, either directly or indirectly, voluntarily assist one *John Bage* in establishing a partnership in either of the said recited contracts. And that the defendants should pay to the plaintiff, and the plaintiff should accept from the defendants, the sum of 4500*l.* by instalments all of which were to be become due and payable before the day on which the last instalment of the said sum so awarded to the plaintiff as aforesaid by virtue of and according to the terms of the said award was to become due and payable: namely: 1000*l.*, part of the said sum of 4500*l.*, on the day of the making the said agreement; the sum of 1000*l.*, further part thereof, in the month of *February* in the year 1851; the sum of 1250*l.*, further part payment thereof, on the 14th day of *April* in the year aforesaid; and the sum of 1250*l.*, residue of the said sum of 4500*l.*, on the 14th day of *June* in the year aforesaid: in full satisfaction and discharge of the said sum so awarded to be paid as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award; and that the plaintiff should accept the said agreement, and the performance thereof by the defendants, in full satisfaction and discharge of the said sum so awarded to the plaintiff as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award: and the plaintiff then accepted the said agreement, and the performance thereof by the defendants, in full satisfaction and discharge of the said sum so awarded to him, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach." Averment: that defendants did not assist *John Bage*, and that "they paid to the plaintiff the said sum of 1000*l.*, the first

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1854. instalment of the said sum of 4500*L*, which the plaintiff then accepted in satisfaction and discharge of the said first instalment; and the said sum of 1000*L*, further part thereof, in the said month of *February* in the year aforesaid; and the said sum of 1250*L*; further part thereof, to wit on the 14th day of *April* in the year aforesaid, which the plaintiff then accepted in satisfaction and discharge of the said third instalment of the said sum of 4500*L*; and the said sum of 1250*L*, residue thereof, on the 14th day of *June* in the year aforesaid, in full satisfaction and discharge of the said sum so awarded as aforesaid, and of the said award thereof, and of all causes of action in respect thereof, and of the said breach of the said award, according to and in performance of the said agreement on their part and behalf: and that the plaintiff accepted from the defendants the said sum of 4500*L*, and the payment thereof by the defendants by the said several instalments on the said several days and times in that behalf aforesaid, and on the several occasions on which the said several instalments were so paid to him by the defendants as aforesaid, in pursuance of the said agreement.

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Replication: taking issue on the plea (a).

On the trial, before *Erle J.*, at the last *Durham Assizes*, the onus being on the defendants, they began. It appeared that, after the award was made, the defendants were dissatisfied with it, and did not pay the first instalment when due. Subsequently the plaintiff and defendants came to a verbal agreement to the effect set forth in the plea. The two first instalments of

(a) There was a second replication, which was not insisted upon at the trial.

1000*l.*, under the substituted agreement, were paid by the defendants to the plaintiff. Before the 14th of *April* (when the third instalment under the substituted agreement became due), the plaintiff required the defendants to sign a letter concerning *Bage's* claim mentioned in the plea. This defendants declined to do, on the ground that it was no part of the agreement. The plaintiff received the payment of 1250*l.* on the 19th of *April*, and a further payment of 1250*l.* on the 14th of *June*. On each occasion he insisted on having the letter signed, but made no objection on the ground of the *April* payment being after date; and on each occasion an acknowledgment of the receipt of 1250*l.*, "on account of the sum due under the award," was given. The acknowledgments were dated respectively 19th *April* and 14th *June*, 1851. Afterwards the defendants, in *May* 1852, were induced to sign the required letter, and sent it to the plaintiff, who refused to receive it, and insisted on being paid 503*l.* 17*s.* 10*d.*, the balance of the original award after giving credit for the 4500*l.* It appeared that it was no part of the agreement that the letter should be signed. The plaintiff's counsel contended that the plea was not proved, because the plea must be construed as averring a binding agreement, and a parol agreement to take satisfaction for the instalments not yet due under an award founded on a submission under seal was not binding. They also objected that the averment, that the last instalment but one, under the substituted agreement, was paid on the 14th *April*, was not proved, inasmuch as it was in fact paid on the 19th. The learned Judge directed a verdict for the defendants, subject to leave to move to enter a verdict for the plaintiff, on either of the above grounds,

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1854. it being taken as a fact that the payment on the
 SMITH 19th *April* was received by the plaintiff as for a payment
 v. on the 14th *April*. *Hugh Hill*, in the ensuing term,
 TROWSDALE. obtained a rule *Nisi* accordingly.

Knowles and *Joseph Addison* shewed cause (a). The action here is not upon the deed of submission only, but on the deed and the award which was not under seal. The accord which is pleaded was made after the breach by not paying the first instalment: accord by parol and satisfaction was therefore a good plea; *Blake's Case* (b). And this is not merely an accord to pay a smaller sum; but it is also an engagement not to assist *Bage*, which might be satisfaction for any amount. Besides, the new agreement was to pay a smaller sum before the larger became due; and that is good satisfaction; *Pinnel's Case* (c). Then the precise day of payment is not material: the acceptance in satisfaction is the gist of the plea. Here, the payment being made by defendants as the substituted instalment, the plaintiff could not apply it to the award; *Anonymous* (d) case in *Cro. Eliz.*

Hugh Hill and *Manisty*, in support of the rule. First: The covenant in the deed of submission to fulfil the award could not be discharged before breach except by an instrument of as high a nature; *Snow v. Franklin* (e), *Spence v. Healey* (g), *Mayor of Berwick v. Oswald* (h), *Neale v. Sheaffield* (i). The plea might have

(a) The argument was begun on *January* 11, and concluded on this day.

(b) 6 *Rep.* 43 h.

(c) 5 *Rep.* 117 a.

(d) *Cro. Eliz.* 68.

(e) 1 *Lutw.* 358.

(g) 8 *Exch.* 668.

(h) 1 *E. & B.* 295.

(i) *Cro. Jac.* 254.

been good as to the first instalment under the award, though the agreement for accord had been by parol; for that instalment was already due; but in that case the plea could not be good as to the last, unless the substituted agreement was under seal; and the plea must be construed in a sense which will make it good, and must therefore be understood to aver an agreement under seal. That a new agreement, not under seal, cannot be an answer to an action brought upon a contract under seal, appears from *Blake's Case* (a). Here the action is on the deed; and therefore the agreement, which is to support a plea of accord and satisfaction, ought to be by deed; *Preston v. Christmas* (b). It would have been otherwise had the action not been upon the deed, but upon a default in some matter not accruing in certainty from the deed, as was said in *Blake's Case* (a). The agreement which the plea sets up was prior in time to all breaches of the deed but one; therefore it must be set up as doing away with the specialty contract, not as satisfying the damages. The distinction between causes of action arising wholly on a deed, and those which arise partly upon the deed and partly on other matter, is illustrated by the cases which decide when Nil debet may or may not be pleaded: *Milbain v. Mather* (c) is such a case. [Lord Campbell C. J. What would have been the form of action upon such a cause of action as this?] It must have been in debt or covenant, and could not have been in assumpsit, the submission not being by parol: that is a conclusive test. If a bond be conditioned for payment of money, a less sum paid before the day, or a parol accord and satisfaction by some other act, may be

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(a) 6 Rep. 43 b.

(b) 2 Wils. 86.

(c) 5 Exch. 55.

1854. set up, because this satisfies the condition; but, where there is a direct contract, as to perform an award, which is sued upon, and not merely introduced into the declaration by way of inducement, that can be discharged, before breach, by accord and satisfaction only where the satisfaction is acknowledged under seal; *Pinnel's Case* (a). This is explained in *Neale v. Sheaf-field* (b). *West v. Blakesway* (c) is an exemplification of the same principle. Secondly: the day of payment, which the plea names, as fixed by the new agreement, was material. [Lord Campbell C. J. But, treating the second agreement as well substituted for the first, might not a payment on the 19th of April be well accepted in satisfaction of the instalment due on the 14th?] That perhaps might be: but it is not a performance of the second agreement; and, if the plea had been that, under the new agreement, the plaintiff accepted a payment after the day named in satisfaction of the payment on the stipulated day, such plea would have been bad. [Lord Campbell C. J. It would shew a performance to the satisfaction of the party.] But not a performance according to the purport of the agreement. At any rate, the plea, as it now stands, was not proved. [Wightman J. Suppose the plaintiff had agreed to take goods for money, and they had been delivered to him.] That would, legally, have been a payment of money. [Lord Campbell C. J. Suppose the plaintiff had said: I do not want the money now; pay it to me to-morrow.] That would not have been a performance of the agreement. The payment amounts to nothing except as in performance of the agreement;

(a) 5 Rep. 117 a.

(b) Cro. Jac. 254.

(c) 2 M. & G. 729.

Bainbridge v. Lax(a). It was not necessary here that the plaintiff, when he refused to accept payment except as on account of the whole sum awarded, should have stated that he refused it also as under the second agreement, because not paid on the day named: it is enough, if he had good cause of refusal and did refuse; just as a party who distrains, and gives notice of a distress for rent arriere, may avow for a heriot. [*Coleridge J.* Suppose the indorser of a bill of exchange waives the objection to the notice of dishonour being too late: can he afterwards insist on want of notice?] The correct view of such a case seems to be that the waiver is evidence, to go to a jury, that the notice was in fact given in time. [*Coleridge J.* Here you seem to say that there was no waiver. Lord *Campbell C. J.* I think that, as it was not demanded that any question on the point should be put to the jury, we must take it that the money was accepted as a performance of the agreement.] That is inconsistent with the form of the acknowledgments. [*Erle J.* I think we must at least take it that, as far as the receipt went, it was to be considered between the parties as a receipt on the 14th.]

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Lord CAMPBELL C. J. I am of opinion that this rule must be discharged. It was granted on two grounds: first, that the plea could not be proved without putting in evidence an agreement under seal; 2dly, that in fact the plea was not proved, even supposing an agreement not under seal was admissible. Both grounds fail. As to the first ground: after breach of the original contract,

(a) 9 Q. B. 819. See *Hall v. Flockton*, 16 Q. B., in Exch. Ch., affirming the judgment of Q. B. in *Flockton v. Hall*, 14 Q. B. 380.

1854. there may be an agreement which, when performed,
SMITH will shew accord and satisfaction: and such an agree-
V. ment need not be by deed. The action is for breach of
TROWDALE duty in not performing the award; but it is not, properly
speaking, on the deed of submission. The defendant
did not pay the first instalment according to the terms
of the award; after that default the parties entered into
a new agreement. Now, when we look at the declaration,
we see that the gist of the complaint is, not the non-
payment of any particular instalment, but generally the
non-payment of the sums awarded to be paid. After
that duty had been broken, the new agreement was
made, which is stated in the plea: and the plea, after
stating it, alleges its performance: that the performance
was, by the agreement, to be taken, and was taken, in
satisfaction of the duty arising from the award and from
the damages accruing from the non-performance of that
duty. There was no necessity that such an agreement
should be by deed. Then, secondly, as to the perform-
ance of the agreement in satisfaction. The performance,
as to the instalment in question, is thus averred: that
the defendants "paid to the plaintiff" "the said sum
of 1250*l.*, further part thereof, to wit on the 14th day of
April," "which the plaintiff then accepted in satis-
faction and discharge of the said third instalment of
the said sum of 4500*l.*:" "and that the plaintiff accepted
from the defendants the said sum of 4500*l.*, and the
payment thereof by the defendants by the said several
instalments on the said several days and times in that
behalf aforesaid, and on the several occasions on which
the said several instalments were so paid to him by
the defendants as aforesaid, in pursuance of the said
agreement." On its face, the plea is clearly good. Then,

was it not proved, to the conviction of the jury, that such payment was made and accepted in satisfaction? The money is given, on the 19th, to the plaintiff with his consent : is not that a performance of the agreement on which the accord is founded? Can the plaintiff, after that, say that the defendants have not performed the agreement? I am of opinion that this is abundant proof that the agreement of the defendants was performed both in form and substance.

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COLERIDGE J. The legal principle appears to be agreed upon by both sides. I am of opinion that the deed, which contains the submission, is mere inducement. There was a breach of it before the accord, by the non-payment of the first instalment. Then that lets in the plea as pleaded, that is, without any averment that the accord was under seal. As to the second point, the payment on the 19th was taken by the plaintiff without any objection as to its being made after the 14th. That amounts, in substance, to an agreement to treat it as a payment made on the 14th.

WIGHTMAN J. I am of the same opinion on both points. The action is on the award: the deed of submission is mere inducement. Accord and satisfaction may take place under a parol agreement made after breach of a special contract: and here the non-payment of the first instalment was a sufficient breach, either of the award or of the covenant to perform it: and it is after that breach that the substituted agreement and its performance are accepted in satisfaction. Then the payment of the instalment under the substituted agreement was accepted as made on the 14th of *April*.

1854. **ERLE J.** The question as to whether there could be accord and satisfaction under the substituted agreement depends on the question whether the action is brought on the award. Now the declaration is not founded on the deed of submission alone : and the accord and satisfaction is for the breach of the award, and may therefore be by parol. Then comes the question, whether the defendants have performed the substituted agreement. On the 19th the plaintiff accepted a payment as made on the 14th. If the performance is good in substance, that is enough ; both time and place may be immaterial. Here the time was, I think, immaterial. The rule must therefore be discharged.

Rule discharged.

The **NEWMARKET** Railway Company *against* The
Churchwardens and Overseers of the Parish of
ST. ANDREW THE LESS, CAMBRIDGE.

By agreement between the **E. Railway Company** and the **N. Railway Company** (confirmed by Act of Parliament), the **N. Company** agreed to complete a

ON appeal, by *The Newmarket Railway Company*, against a rate for the relief of the poor of the parish of *St. Andrew's the Less, Cambridge*, a case was, under stat. 12 & 13 *Vict. c. 45. s. 11.*, stated, by order of a Judge, for the opinion of this Court.

branch of their railway communicating with the *E.* line, and agreements were made for the interchange of traffic, and the *E.* Company bound themselves, whenever the dividend of the *N.* Company, from their earnings on their whole line, fell below three per cent., to make good the deficiency to an extent not exceeding 5000*l.*

The *N.* Company completed and worked the branch. The expenses of working the branch exceeded the gross receipts on the branch : but, the dividend of the *N.* Company from their whole line falling short of three per cent., the *E.* Company made good to them the deficiency amounting to 3705*l.* On appeal against a rate for the relief of the poor in a parish through which the branch line passed, a case was stated in which the only question was, Whether this payment ought to be taken into account in estimating the rateable value of the branch.

Held by *Coleridge J.* and *Erle J.* that it could not be so taken into account.
Lord Campbell C. J. dissentiente.

The case stated that, in the rate appealed against, *The Newmarket Railway Company* were assessed as occupiers of land used as a railway of the gross value of 145*l*, and of the rateable value of 116*l*; and that the grounds of appeal were that this was an over assessment. It then proceeded as follows. "By *The Newmarket and Chesterford Railway Act, 1846*" (9 & 10 *Vict. c. clxxii. (a)*), the appellants, by their then name of *The Newmarket and Chesterford Railway Company*, were empowered to make and maintain a railway, from the *Cambridge* line of the *Eastern Counties Railway* at or near *Chesterford* to the town of *Newmarket*, with a branch to the town of *Cambridge*. At the time of the making of the agreement next hereinafter mentioned, the appellants had made the said railway, which they were so empowered to make from *Chesterford* to *Newmarket*, but they had not made the said branch to *Cambridge*. By an agreement, bearing date and made on the 28th day of *May* 1851, between *The Eastern Counties Railway Company* of the one part, and the appellants of the other part (a copy of which accompanied and was to be deemed and taken as a part of the case), after reciting, amongst other things, that, in consideration of the benefit likely to accrue to *The Eastern Counties Railway* from the construction of the said branch, and the working of the railway of the appellants in connection with their railway, *The Eastern Counties Railway Company* were willing to secure to the appellants certain advantages as therein after expressed and defined: it was mutually agreed between *The Eastern Counties Railway Company* and the appellants, amongst other things, as follows, viz.

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(a) Local and personal, public: "For making a railway from *Chesterford* to *Newmarket*, with a branch to *Cambridge*."

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"1st. That the appellants should proceed with all convenient dispatch to make and complete at their own expense the said branch railway, that is to say, from *Little Field Road* in the parish of *Wilbraham* to a junction with the *Eastern Counties* Railway at or near the *Cambridge* Station.

"12th. That, whenever, after the opening of the said branch line and during the continuance of the said agreement, the net earnings of the appellants, after payment of working expenses and other charges upon revenue and interest on borrowed capital, should not be sufficient to pay a dividend on their share capital, or on any stock into which the same might be thereafter converted, equal to three per cent. per annum upon their capital of 350,000*l.*, *The Eastern Counties Railway Company* should and would, on notice and requisition to that effect by the appellants within a reasonable time before the day in each half year when the dividend should be made payable, pay to the appellants, or permit them to retain out of any moneys in their hands for which they might be accountable to *The Eastern Counties Railway Company*, such a sum of money as would be sufficient to make up the dividend to the said rate of three per cent. per annum: Provided that the whole sum payable or to be allowed by the *Eastern Counties Railway Company* to the appellants in any one year under or by virtue of the said agreement should in no case exceed the sum of 5000*l.*

"18th. That the said agreement should continue in force for the term of ninety nine years reckoned from the opening of the said branch line to *Cambridge (a)*.

(a) The provisions in the agreement, not set out in the case, were for the mutual interchange of traffic, and similar purposes, and did not qualify those above set out.

"After the making of the said agreement, and before the passing of the Act of parliament hereinafter next mentioned, the appellants did at their own expense, pursuant to the said agreement, make and complete the said branch railway to *Cambridge* in the said agreement mentioned; and the same was duly opened on the 9th day of *October* 1851.

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"By *The Eastern Counties and Newmarket Railways Arrangements Act, 1852 (a)*, it was enacted that the said agreement should be and was thereby made and declared to be valid and binding on each of the said Companies."

The case then shewed that the branch railway ran, partly, through the respondent parish, and that the rate in question was on the land in that parish which was occupied by the appellants as part of that branch. The gross earnings of the whole branch line amounted to 9705*l.* 3*s.* 8*d.*, and the outgoings, which it was agreed were proper deductions, to 10,370*l.* 4*s.* 2*d.*: and it was agreed that the proportionate part of the gross earnings and outgoings belonging to the portion of the branch line in the respondent parish were respectively 404*l.* 7*s.* 8*d.* and 432*l.* 1*s.* 10*d.*, so that, merely looking to the receipts, the branch line was worked at a loss. The case then proceeded. "The net earnings of the appellants, after payment of working expenses and other charges upon revenue and interest or borrowed capital, not being sufficient to pay a dividend on their share capital equal to three per cent. per annum upon their capital of 350,000*l.*, *The Eastern Counties Railway Company* did, during the aforesaid period of one year immediately preceding the making

(a) Stat. 15 & 16 *Vict. c. li.* "To confirm an agreement therein mentioned between *The Eastern Counties Railway Company* and *The Newmarket Railway Company*."

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"It is contended by the respondents that the said sum of 3705*l.* 9*s.* 7*d.*, so paid to the appellants, ought to be taken into account in ascertaining the annual rateable value of the said railway and branch railway. The correctness of the view so contended for by the respondents is denied by the appellants.

"The question for the opinion of the Court of Queen's Bench is, Whether the said sum of 3705*l.* 9*s.* 7*d.*, so paid to the appellants as aforesaid, ought by law to be taken into account in ascertaining the annual rateable value of the said railway and branch railway, and Whether the appellants were or are by law assessable to the said rate in respect of or upon that sum.

"If the Court shall be of opinion that the said sum of 3705*l.* 9*s.* 7*d.* ought not by law to be taken into account in ascertaining the annual rateable value of the said railway, and that the appellants were not, or are not, by law to be assessed to the said rate in respect of or upon that sum, then the said appeal is to be allowed, and the said rate is to be amended by reducing each of the sums of 145*l.* and 116*l.*, which now appear upon the said rate as the "Gross Estimated rental" and "Rateable value" of so much of the said branch railway as is situate within the respondent parish, to the sum of 21*l.*; and the said Court of Quarter Sessions shall and may adjudge ac-

cordingly; and that the respondents do and shall pay to the appellants the sum of 20*l.* for costs.

"If this Court shall be of a contrary opinion, then the said appeal is to be dismissed; and the Court of Quarter Sessions shall and may adjudge accordingly; and that the appellants do and shall pay to the respondents the sum of 20*l.* for costs."

The case was argued in last *Trinity Term* (*June 1st*), by *Worlledge* in support of the rate and *H. Hawkins* for the appellants.

The judgments render it unnecessary to report the argument.

Cur. adv. vult.

In this term, *January 30th*, there being a difference of opinion, the learned Judges delivered separate judgments.

ERLE J. The only question submitted to us in this case is, Whether, in rating the appellants to the relief of the poor for the portion of their railway in the parish of *St. Andrew the Less*, a sum of 3705*l.* 9*s.* 7*d.*, paid to them by *The Eastern Counties Railway Company*, ought to be taken into consideration as adding to the rateable value.

By "*The Newmarket and Chesterford Railway Act, 1846*," the appellants were empowered to make a railway from *Chesterford* to *Newmarket*, with a branch to *Cambridge*. Having made the railway from *Chesterford* to *Newmarket*, but not the branch to *Cambridge*, and *The Eastern Counties Railway Company*, with whose line it was to communicate, desiring that it should be completed, the two Companies, on the 28th of *May 1851*, entered into articles of agreement, by which, after reciting that *The Eastern Counties Railway Company*

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were willing to secure to *The Newmarket Railway Company* certain advantages, it was stipulated that *The Newmarket Railway Company* should, with all convenient dispatch, make and complete the said branch to a junction with the *Eastern Counties Railway* at *Cambridge*, and that, whenever the net earnings of *The Newmarket Railway Company* should not be sufficient to pay a dividend equal to three per cent. per annum on their capital of 350,000*l.*, *The Eastern Counties Railway Company* would pay to *The Newmarket Railway Company* such a sum of money as would be sufficient to make up the dividend to three per cent. per annum, so that this sum should not exceed 5000*l.*

The branch was accordingly made by *The Newmarket Railway Company*, and opened on the 9th October 1851; and the agreement, which was entered into for 99 years, was, in 1852, confirmed by Act of parliament. The branch railway continued to be occupied and worked by the appellants: and, the year preceding the making of the rate appealed against, the appellants were unable from their net earnings to pay a dividend of three per cent. upon their capital; and *The Eastern Counties Railway Company* paid them 3705*l.* 9*s.* 7*d.*, under the agreement, to make up the dividend to three per cent. per annum.

The appellants contend that this sum ought not to be taken into consideration in assessing them as occupiers of the railway to the relief of the poor, as it is not an earning of their railway, nor rent, nor money in the nature of rent, paid for the use of the railway, but a payment arising from a contract of guaranty, and not derived from the profits of the occupation of the land. And I am of this opinion.

The rateable value of the railway is, by the Parochial Assessment Act (*a*), the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and deducting the probable costs necessary to maintain it in a state to command such rent. If the railway was let, the amount of rent would depend on the amount of annual profit to be derived therefrom, and it would be immaterial to the tenant whether this exceeded or fell short of three per cent. on the cost price of the line; the cost of a construction does not indicate the profit to be obtained therefrom as a matter of fact; and it was decided in *Regina v. Mile End Old Town* (*b*) to be no criterion in law of the rateable value of any property to the poor rate. If the purchaser of a farm had a guaranty that the rent should yield him three per cent. on the purchase money, the rateable value, that is the rent which a tenant would pay for the farm, would not be increased by this collateral contract between the landlord and the guarantor; now the *Newmarket* shareholders are, in effect, the landlords of the railway; the Company are the tenants paying dividend for rent; and *The Eastern Counties Railway Company* are the guarantor; and the contract of guaranty is irrevelant to the rateable value. Furthermore, the sum paid under the guaranty is not rateable, for it is not a *parochial* profit; nothing is due under the guaranty until the profits, upon both the *Newmarket* and *Chesterford*, and the *Newmarket* and *Cambridge*, lines, have been ascertained, when, if the sum total is less than 10,500*l.*, the guarantors must pay. I am not able to discover how the failure of profits, upon the parts of the line in distant parishes, becomes a

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(a) Stat. 6 & 7 W. 4. c. 96.

(b) 10 Q. B. 208.

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net profit, upon the part of the line in *St. Andrew's the Less*, for which a tenant of that part alone would pay rent. Indeed this parish offers as proof of the rateable value of the part in their parish that it is worked at a loss; that loss contributes to the general loss, and so to earning the deficiency of profit for which the guarantors pay: thus the parochial loss is, by reason of the guaranty, pro tanto a parochial profit; and, on this principle, the greater the loss in the parish the greater would be the parochial share of the payment made by the guarantor; which seems a strange result.

Furthermore, the rate upon the sum paid under the guaranty is not legal; for it falls, not on the occupier, but the guarantor. The rate is, nominally, on *The Newmarket Railway Company*: but, if it is sustained, it must be paid by *The Eastern Counties Railway Company*, who agree to make good the deficiency in case the net profits after paying all deductions will not yield a dividend of three per cent. on the capital. In proportion as the deductions are increased, the net profits are less, and the deficiency to be made good is greater. The poor rate is one of the deductions to be provided for before any dividend is payable; and, if the 3705*l.*, now required to make up the deficiency, be subject to poor rate, it will no longer yield the required dividend, but must be increased by the amount of that rate. Nay, if the principle is followed out, the guarantors will not only pay the poor rate on this deficiency, but that poor rate will, by the same process, become also profit, and also rateable value, and the subject of a further poor rate thereon. And these consequences, which may be followed further, also lead to strange results.

With respect to the profits derived from the terms on which traffic is interchanged between the two Com-

panies: those profits are liable to be rated where they arise, and are not included in the present question: and it should be observed that the terms in the agreement are, throughout, a premium to the *Newmarket* shareholders to induce them to advance the necessary capital for making the line.

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With respect to the argument from the expected amount of rent or profit: that may be presumptive evidence of the rateable value; but it is a presumption open to being rebutted; and, here, there is no room for presumption, as it is found by the case that the sum in question is not a profit derived from the railway in the parish, but a payment under a contract by reason of the absence of profit.

With respect to the argument from the tendency of the line of *The Newmarket Railway Company* to increase the profits of *The Eastern Counties Railway Company*: *The Newmarket Railway Company* are not liable to be rated for any profit, or tendency to profit, enjoyed by another Company: that Company must be rated for the profits they actually make in the parish where they arise: but no Company is liable to be rated for a supposed tendency to profit, not resulting in actual profit. The respective values of two rateable subjects may be increased by combining their operation; and, in that event, the rate will be increased accordingly; but the rate must be on the actual profit, when it arises, and not on a tendency to profit.

I consider that this principle was laid down in *Regina v. Great Western Railway (a)*, where it was contended that a branch railway, yielding no profit, was liable to be rated on account of its tendency to increase the

(a) 15 Q. B. 1085.

1854. profit of the trunk line, and the Court decided to the contrary, and, in so deciding, did not impair the principle that the rateable value of each of two rateable subjects may be increased by their combined operation, in case the aggregate of the profits from both is increased thereby.

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Erie J. On these grounds I have come to the conclusion that the sum paid under the contract of guaranty in this case was not rateable, and that the rate ought to be reduced accordingly.

Coleridge J. COLERIDGE J. The facts of this case have already been sufficiently stated; and it is unnecessary for me, therefore, to repeat them. And the question which they raise is, Whether a proportional part of a sum of 3705*l.* 9*s.* 7*d.*, paid by *The Eastern Counties Railway Company* to the appellants, ought to be taken into account in assessing them as occupiers of land in the repondents' parish, on the ground that it forms part of the rateable value of that land. There can be no dispute as to the principle which is to determine this question; that money, or money's worth, should form part of the rateable value of land, it is not enough that the occupier should receive it being the occupier, or even because he is the occupier; but it must directly or indirectly spring out of and be part of the fruits of the occupation. If the *Marlborough* pension, granted under stat. 5 *Ann. c. 4.*, had been limited to *John Duke of Marlborough* and his heirs, occupiers of the *Blenheim Estate*, it would have been received by the Duke for the time being, in some sort because he was occupier; that is, if not occupier, he would not receive it; and yet, it never could have been considered as forming part of the

rateable value of the estate. It would not in that sense spring out of the occupation. This distinction was I think recognised by this Court in *Rex v. The Aire and Calder Navigation Company* (a), where the occupiers of certain mills in *Hunslet* received tolls, collected in a different township, as a compensation for loss of water by the work of an adjoining Navigation Company, and these were sought to be included in the rateable value of the mills, as increasing the value of the occupation of them. Lord *Tenterden*, delivering the judgment of the Court against the assessment, says: "Suppose that instead of the toll an annual rent had been given, or a sum in gross from which they derived an income? Could they have been rated in respect of that, as profit arising from their property in *Hunslet*?" There are special circumstances in that case which prevent me from considering the decision as a direct authority for the case before us: but the passage which I have cited from the judgment illustrates the distinction which must be kept in view.

The very nature of the distinction makes it rather difficult to apply it; and very small changes in the circumstances would make the case fall within one or the other branch of it. Thus, if *The Eastern Counties Railway Company* were under an agreement to pay absolutely a sum per head, in addition to the ordinary fare, for every passenger brought upon the appellants' line to be forwarded on their line, this would have been a sum received for the transit of such passengers, and would have been as much a part of the profits of the occupation as the ordinary fare which the passenger himself paid. But the substance of the actual agree-

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(a) 3 B. & Ad. 523.

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ment seems to be rather that of a guaranty, which is not to come into operation till the actual fruits of the occupation fall below a certain amount.

The dividend on the capital is to be paid from the clear profits of the occupation; when they fail, the guaranty comes in, not to increase those profits, but to make the dividend good from another and independent and collateral source. But it is the profits, after deducting the proper outgoings, upon which the rate is to be assessed; and when that is done, and not before, it will be seen whether the guaranty is to operate or not.

In the present case, the total receipts fall below the outgoings. The line is worked to a loss: but suppose there had been a surplus sufficient for a dividend of two per cent., ought not the rate to have been imposed on that? and then, when *The Eastern Counties Railway Company* had under their guaranty paid one per cent., would not the distinction between the sources of the two and the one have been obvious, and would it not have followed that the latter ought not to be brought into the assessment?

This was an obligation which *The Eastern Counties Railway Company*, for the interest which it was conceived they had in the appellants' line being made and worked, took on themselves. Supposing it had, instead of being shaped in the present form, been by way of a large sum paid down on the completion of the line, which sum the appellants had set apart as a rest or reserve fund: and then, in any year, the dividend falling low, a sum had been voted from that rest, and applied in addition to the dividend, so as to raise it to a given amount: could it have been said that that addition

formed any part of the fruits of the occupation during the preceding six months? I think not; and yet I do not see how that case would have differed in principle from the present. The "rateable value" must always have been included in, and formed part of the "gross estimated rental;" and that gross rental must have been estimated before the process of deduction from it commenced. In the present case it might be perfectly clear, before commencing that process, that the outgoings would overtop the gross receipts; but it is by no means an unreasonable thing to suppose the gross receipts mounting so high as to make it impossible to say, before hand, whether there would be any, and if any what, amount of clear profits, until the process of deduction had been gone through. The necessity then for recourse to the help of the guaranty would be contingent; and the addition ultimately to come from that source to make up the three per cent. dividend would be subsequent to the complete ascertainment of the two sums, the ascertainment of which was alone necessary to arrive at the rateable value.

It will be said of course that, in order to arrive at the rateable value, a negotiation for a lease from year to year must be supposed, and that that negotiation must be supposed to proceed on the footing of the lessee being placed in exactly the same position as the present occupiers; and this is unquestionably true as to every thing which necessarily arises from the occupation. But, if thence it is inferred that the supposed lessee would necessarily, as such, have the benefit of this guaranty, it seems to me the very question in the case is begged. In point of fact, a lease of the line might very well be made, supposing the requisite powers,

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without involving a transfer of the benefit of this agreement to the lessee.

Suppose, at any six months' end, the accounts made up, and clear profits shewn from which a dividend of two per cent. might be paid, *The Eastern Counties Railway Company*, upon application, refusing to perform their agreement and an action brought on it; I apprehend that, before such action brought, the course would have been to declare the dividend of two per cent., which would have been after deduction of the poor rate, and then to sue for the difference. Now the foundation of that action would have been the deficiency of those clear profits upon which the assessment must have been made; that is to say, in the words of the agreement, "the net earnings of the appellants, after payment of working expences and other charges upon revenue and interest on borrowed capital." In this case it seems to me clear that, if the appellants succeeded in their action, and recovered in damages the difference sued for, that sum could not find its way properly into the rateable value: and I do not see any distinction in principle between that case and the present, as to the question before us.

The facts of this case are very peculiar, and will seldom form a precedent for any other. Upon the best understanding of them which I have been able to form, I think the appellants are entitled to our judgment.

Lord
Campbell C. J.

Lord CAMPBELL C. J. In this case, I have the misfortune to differ from my brothers *Coleridge* and *Erle*: and, although their opinion must prevail, I consider it my duty to state the grounds on which, entirely concurring in the general principles which they lay down, I arrive at a different result.

The only question submitted to us is, whether in rating the appellants to the relief of the poor for the portion of their railway in the parish of *St. Andrew the Less*, the sum of 3705*l.* 9*s.* 7*d.*, paid to them by *The Eastern Counties Railway Company*, ought to be taken into consideration in estimating the rateable value.

The appellants were empowered to make a railway from *Chesterford* to *Newmarket*, with a branch to *Cambridge*. Having made the railway from *Chesterford* to *Newmarket*, but not the branch to *Cambridge*, and *The Eastern Counties Railway Company*, with whose line it was to communicate, considering that they would derive great benefit from its completion, the two companies, on the 28th May 1851, entered into articles of agreement, by which, after reciting that *The Eastern Counties Railway Company* were willing to secure to *The Newmarket Railway Company* certain advantages, it was stipulated that *The Newmarket Railway Company* should make and complete the said branch to a junction with the *Eastern Counties Railway* at *Cambridge*, and that, whenever the net earnings of *The Newmarket Railway Company* should not be sufficient to pay a dividend equal to three per cent. per annum on their capital of 350,000*l.*, *The Eastern Counties Railway Company* would pay to *The Newmarket Railway Company* such a sum of money as would be sufficient to make up the dividend to three per cent. per annum, so that this sum should not exceed 5000*l.* The branch was accordingly made by *The Newmarket Railway Company*, and opened on the 9th October 1851. This agreement, which was entered into for ninety nine years, was, in 1852, confirmed by Act of Parliament. The branch railway continued to be occupied and worked by the appellants. In the year

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1854. preceding the making of the rate appealed against, the
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Lord The appellants contend that this sum ought not at
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 occupiers of the railway to the relief of the poor;
 alleging that it cannot be treated as the earnings of their
 railway, or as rent, or money paid in the nature of
 rent, for the use of the railway, and ought to be
 considered only as an indemnity to the appellants,
 or a payment to them under a guaranty, unconnected
 with the occupation or enjoyment of land. But I
 am of opinion that, in assessing the appellants for the
 portion of the branch line which is in the limits of the
 respondent parish, this payment ought to be taken
 into consideration.

I think it is received by the appellants in respect of
 their occupation of their railway, and is part of the
 profits of that occupation. It is evidently made in
 consideration of an advantage which *The Eastern Coun-*
ties Railway Company calculate that they derive from
 this branch railway from *Chesterford* to *Cambridge*.
 Whether it be a fixed annual sum or a sum depending
 upon a contingency, it is equally in respect of the use
 made of a railway occupied by the appellants, and, when
 received, it is part of the profits of that railway. If
The Eastern Counties Railway Company paid the appel-
 lants a sum of money for being allowed to bring
 passengers in their own carriages from *Chesterford* to

Cambridge gratis, that these passengers might be carried on the *Eastern Counties* line, for hire, from *Cambridge* to *London*, little doubt can be entertained that such a payment would be part of the profits of the branch of the appellants: and it seems to make no difference that the payment is made in respect of passengers brought from *Chesterford* to *Cambridge* in carriages of the appellants, *The Eastern Counties Railway Company* deriving the same profit from conveying them forward to *London*. The railway, within the respondent parish, is rendered more valuable and productive by something connected with the use of it in another parish, and, according to decided cases, its rateable value within the respondent parish is thereby enhanced.

By the 7th article of the agreement: "In respect of all traffic, whether of passengers or of goods which *The Newmarket Railway Company* shall bring from any part of their railway, distant more than four miles from the *Cambridge* station, to *Cambridge*, to be carried upon *The Eastern Counties* railway to" certain places enumerated, "the *Newmarket Railway Company* shall be entitled to retain, out of the tolls, rates and charges received by them upon such traffic, sixty per cent. of the gross amount thereof." The per centage of the tolls so retained would clearly be part of the profits of the branch, in respect of which the appellants would be liable to be rated; and the effect would not be different if the right of retention had been made to depend upon the contingency of profits of *The Newmarket Railway Company* not being otherwise sufficient to enable them to pay a dividend of three per cent. upon their capital. Again, suppose that, with a view to make the branch a more effective feeder to *The*

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1854. *Eastern Counties* line from *Cambridge* to *London*, it had been stipulated by the agreement that *The Newmarket Railway Company* should bring goods and passengers at very low rates from *Chesterford* to *Cambridge*, *The Eastern Counties Railway Company* undertaking to make up the deficit if the net profits did not enable *The Newmarket Railway Company* to pay a certain dividend on their capital: surely a payment to make up the deficit ought to be included in the gross earnings of the branch in estimating its rateable value; and, for this purpose, there seems to be no difference, on principle, between such a payment and that which we have here to decide upon. It is admitted that, if the *Eastern Counties Railway Company* had agreed absolutely to pay the appellants so much a head for every passenger carried from *Chesterford* to *Cambridge*, and travelling on by the *Eastern Counties* Railway to *London*, such a payment would be part of the earnings in respect of which the appellants would be rateable. Could any difference be made by a proviso that this payment should not exceed the sum necessary to make up a dividend of three per cent. to the shareholders of *The Newmarket Railway Company*, and that, such dividend being made up, the payment should cease? While the payment goes on to make up the dividend, it still seems to be part of the fruits of the occupation of their railway by the appellants, and I conceive that it must be taken into account in estimating the assessable value of the railway. But all the difficulties, pointed out in bringing the payment in question into account, might be urged against bringing into account the supposed payment which appears so clearly to be an ingredient in the assessable value. While such payments continue, I do

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not see why they are less profits of the railway because, upon a contingency, they may cease. If this branch were let to a tenant he would be entitled under the agreement, and the Act of Parliament confirming it, to this contingent payment; and no doubt it would enhance the amount of the rent which as a tenant from year to year he would be willing to offer for it.

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I have only further to observe, in answer to an objection raised at the bar, that in my opinion the contention of the respondents does not lead to the double rating of the same profits; for, if *The Newmarket Railway Company* were rateable in respect of a payment made to them under this agreement, or under an agreement whereby *The Eastern Counties Railway Company* undertook to pay them absolutely a certain sum for each passenger brought from *Chesterford* to *Cambridge*, *The Eastern Counties Railway Company* would be entitled to a deduction in respect of such payment from their gross earnings when the assessable value of *their* railway comes to be estimated. I wish to adhere to the recent, as well as the earlier, cases on this subject, with this caution, that, when we were determining that in rating railways the parochial not the mileage principle was to be adopted, the Court did not mean to intimate that the assessable value of land in one parish might not be increased by a profit derived from it by the occupier, as occupier, in consideration of an advantage derived from it in another parish.

Upon the whole, my opinion is in favour of the respondents. But there must be

Judgment for the appellants.

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Saturday,
January 14th.

LUMLEY against GYE.

A commission, under stat. 1 W. 4. c. 22. s. 4., issued at the instance of the defendant, directed to an *English* barrister, to examine witnesses in *Germany*. The witness, a *Prussian* subject, being at *Berlin*, the commissioner went thither, but learned that, by the *Prussian* law, an oath could be administered to a *Prussian* subject only by a *Prussian* judge, or some one authorized by a *Prussian* Court. On the petition of the commissioner, a *Prussian* Court authorized *D.*, a *Prussian*, to administer the oath. On the commission being opened, *D.* insisted on assuming the controul of the whole examination, and rejected a question put conformably to the *English* law, on the ground that it could not be put conformably to the *Prussian* law. The parties then refused to act further under the commission.

The commissioner returned these facts: and application was then made, by the defendant, for a new commission, to be directed to a *Prussian* court or judge, without the clause requiring the commissioner to be sworn. From the affidavit in support of the rule, the above facts appeared; and it appeared, further, from the opinion of a *Prussian* lawyer, that the *Prussian* rules of evidence were different from the *English*, especially that examination and cross-examination by counsel was not permitted.

This Court ordered that, on payment of the costs of the first commission by the defendant, a commission should be directed to a *Prussian* judge, as an individual: holding that it ought not to be assumed that the evidence would be taken improperly, and considering that, in the event of such impropriety occurring, an objection might be made at *Nisi prius*. Especially as, by this course, an opportunity would be given of raising, by error upon bill of exceptions, the question whether the issuing of such commission was within the power of this Court.

SIR A. J. E. Cockburn, Attorney General, in last Term (25th November 1853), obtained a rule calling on the plaintiff to "shew cause why the defendant should not be at liberty to issue a commission, addressed to the Royal City Court of *Berlin*, or any judges or judge thereof, or to be appointed thereby, for the purpose of examining witnesses on the defendant's behalf, resident at *Berlin*, in the Kingdom of *Prussia*, and why, in such commission, the usual clause rendering the commissioner's oath necessary should not be dispensed with:" and, further, calling on the plaintiff to "shew cause why a commission should not issue, directed to a commissioner or commissioners for the examination of witnesses on behalf of the said defendant at *Hamburg*, on interrogatories: and why the trial of the issues in this cause should not be postponed until the return of the said commissions:" proceedings to be stayed in the meantime.

The rule was obtained on the affidavit of the defendant's attorney. He deposed that, on 10th *June* 1853, it was ordered by *Wightman* J., on defendant's application, that a commission should issue to examine *Johanna Wagner* and other witnesses residing in *Germany*, and that the trial of the issues in the cause should be postponed until the Sittings after the then next *Michaelmas* Term. That *Johanna Wagner* refused to be examined until she should return to *Berlin*, where her home was, and whence she was to be absent till *November* 1853, and stated her willingness to be examined there. The plaintiff joined in the commission, which was settled and signed, as approved of, by his attorney. The commission was addressed to *Abraham Hayward*, Esq., one of her Majesty's counsel, and was annexed to the affidavit, together with Mr. *Hayward*'s return. From these documents, and the affidavit, it appeared that Mr. *Hayward* arrived in *Berlin* on 3d *November* 1853. That it then appeared that a difficulty was likely to arise from the *Prussian* law not allowing an oath to be administered to a *Prussian* subject otherwise than in the *Prussian* form, and by a *Prussian* judge or functionary. *Johanna Wagner* was a *Prussian* subject. The commission appointed Mr. *Hayward*, and gave him "full power and authority, diligently to examine and cross-examine the witnesses *vivâ voce*, to be produced before you on the part of" the plaintiff and defendant, "to cause the said witnesses to come before you, at *Berlin*, and then and there examine and cross-examine each of them upon their respective corporal oath or affirmation first taken before you according in the form of their several religions, in the form of oath firstly indorsed hereupon. And that you do take such their examinations, and

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reduce them into writing on paper or parchment; and, when you shall so have taken them, you are to send the same without delay to the office of the masters of this Honorable Court" &c. (as usual). That he should take the oath thirdly endorsed on the commission; and that all clerks employed in taking, &c. the depositions should take the oath secondly endorsed; and that, in the event of an interpreter being employed, such interpreter should take the oath fourthly endorsed. Mr. *Hayward*, upon being apprized of the difficulty above mentioned, consulted a *Prussian* lawyer of eminence, the Justiz-rath *Geppert*, and ascertained from him that it would be impossible to proceed in the due execution of the commission without the aid and formal authorization of a *Prussian* Court. After consultation at Mr. *Geppert's* chambers, it was agreed that a petition from Mr. *Hayward* should be presented to the Royal *Prussian* City Court by Mr. *Geppert*. A translation of the petition was set out in the return. It stated the facts of the lawsuit and the commission (of which a *German* translation was appended), and that the witnesses were resident at *Berlin* and subject to the jurisdiction of a Royal City Court; and it proceeded as follows. "To enable me to fulfil my commission, I most respectfully request a Royal City Court to appoint a judge who, according to my direction, in my presence, shall swear the said witnesses in the form of oath prescribed in my commission, and let the further proceeding take place before us. According to the *English* law, it is necessary that the oath be taken before the examination of the witnesses. The oath is therefore framed in this sense. The examination takes place after the administration of the oath in this way, viz.: that the counsel for the

producer puts the questions to be answered by the witnesses, and the counsel for the other party the cross questions. The questions and cross questions, as well as the answers, are taken down in writing by a sworn clerk, which, in the present case, in which the witnesses do not understand the *English* language, will be done through the medium of a sworn interpreter. The clerk and the interpreter have been sent hither from *England*. Both are *English* subjects. There will therefore be no obstacle to my administering to them the oaths prescribed in my commission."

The petition was granted by the President; and Mr. *Diettrich*, a judge of the City Court (*Stadt-gericht*), was named to administer the requisite oaths to the *Prussian* witnesses, and to watch the proceedings.

The commission was opened, before Mr. *Hayward*, on 14th *November*. Mr. *Diettrich* and the counsel for the plaintiff and defendant, and the defendant himself, were present, with others, including a *Prussian* lawyer of eminence who was the legal adviser of *Johanna Wagner*, the witness called by defendant before the commission. Before the examination of this witness commenced, Mr. *Diettrich* stated that, according to the *Prussian* law, one witness could not be present during the examination of another, nor either party during the examination of any witness. The defendant accordingly left the room, his counsel protesting, and although Mr. *Hayward*, as he now returned, "stated that, according to *English* law, the parties to a suit were entitled to be present." The return stated: "I then read over to Miss *Wagner* the oath firstly endorsed upon the said commission; and it was translated to her into *German* by the sworn interpreter: but

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Mr. *Diettrich* refused to let her be sworn in the *English* mode, and also refused to allow the concluding words 'So help me God,' and the kissing of the sacred volume, to be replaced by the *Prussian* form of adjuration: but he administered to her, in a form which she declared binding on her according to her religion, an oath to tell the simple truth, and neither to conceal or add anything to the truth in the course of her examination in the case. Having been thus sworn, she stated, in answer to questions put to her through the interpreter," &c.: some questions and answers were then set out. The return then proceeded as follows. "At this point of the examination, a paper writing was produced and shewn to the witness; and she was asked whether the signature *Johanna Wagner*, which appeared upon it, was in her handwriting: whereupon Mr. *Diettrich* interfered, and stated that the question could not be put without some preliminary specification of the document as required by the *Prussian* practice or rules of evidence: and he prevented the witness from answering it. Hereupon Mr. *Huddleston*, as counsel for the plaintiff, formally protested against the interference of Mr. *Diettrich*, and insisted that the examination would be invalid unless it was conducted according to the *English* practice and rules of evidence, as laid down by the *English* commissioner. Mr. *Creasy*, as counsel for Mr. *Gye*, concurred in this protest: and I then repeatedly and distinctly pointed out to Mr. *Diettrich* that it was quite impossible for me to perform my duty if he persevered in such a course of interposition. I called his attention to the petition which had been granted by the President; and I requested him to observe that, as the *Prussian* tribunals had no question to try in connection with

the case, his proper duty was and could be nothing more than to take care that nothing was done in transgression or violation of the *Prussian* law. I also more than once remarked to him that the individual question was not the real matter in dispute; but that the object of the protest was to have it settled definitively whether the examination was to be conducted according to the *Prussian* practice and rules of evidence, as laid down by him, or according to the *English* practice and rules of evidence, as laid down by me. He, notwithstanding, persevered in what appeared to me a misconstruction of his authority: and, as the counsel on both sides refused to continue the examination unless it was left under my direction, the examination was provisionally suspended; and Mr. *Geppert* was again consulted as to the best mode of enabling the commission to be executed effectively and without the interference of a *Prussian* judge. Mr. *Geppert* was of opinion that, the oath having been duly administered according to the *Prussian* law, the examination might proceed without the presence of a *Prussian* judge, provided the witness appeared voluntarily and was content to submit to such examination." Mr. *Hayward* afterwards received a letter from *Johanna Wagner*, declining to be examined by other than a *Prussian* judge. The defendant's solicitor thereupon informed Mr. *Hayward* (on 15th *November*) that he was unable to procure the attendance of *Johanna Wagner*, and that no witnesses could be produced before Mr. *Hayward* as commissioner.

The affidavit also stated that Mr. *Diettrich*, at the examination of the same witness, forbade a question to be put which Mr. *Hayward* pronounced to be a fit and proper question: whereupon Mr. *Huddleston*, the

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counsel for plaintiff, objected to the interference of Mr. *Diettrich*, whose direction the witness obeyed, and not that of Mr. *Hayward*: and Mr. *Creasy*, the counsel for the defendant, admitted the force of the objection, and stated that he considered it useless to put further questions under the *Prussian* judge's controul. It was further deposed that *Johanna Wagner* had expressed her willingness to give evidence, if examined by a *Prussian* judge: and the deponent believed that she would do so, if a commission for that purpose were directed to the Royal *Prussian* City Court of *Berlin*. That the deponent afterwards laid a case before the said Justiz-rath *Geppert*, as to the mode of taking evidence according to the laws of *Prussia*, and obtained his opinion thereon, a translation of which was annexed to the affidavit. In this opinion Mr. *Geppert* stated that the *Prussian* law of evidence placed the examination of witnesses entirely in the hands of the judge, who was to be furnished with a statement of the circumstances out of which the suit had arisen, and of the questions of fact which, according to the declarations of the parties, remained in dispute, and which the examination of the witnesses was intended to settle: but that the *Prussian* law did not restrict the judge in reference to the mode in which he might put the question: that nothing "opposes his taking into careful consideration the motions of the counsel of the parties; on the contrary," a regulation of the *Prussian* law "explicitly charges him to do so." That "the counsel of the parties have also the right to hand to him written memoirs, setting forth those points which they wish to see more particularly attended to in the examination of the witnesses. Whether this be done" "in the form of special

questions or motions is a matter of indifference, as the law does not prescribe a definite "form; but, with regard to the material tenor" "of the questions, the rules of Court" "make it incumbent upon the counsel of the parties not to perplex the witness through captious questions or suggestions, or to induce" "the witness to make incorrect" "statements." That "this rule applies to the counsel for both parties. On the other hand, the *Prussian* law of evidence" "knows no cross-examination by the counsel of the parties, and can accordingly contain no rules on the point as to what questions are or are not permitted in such cross-examination. In the examination with which the *Prussian* rules of Court charge the judge, every question is permitted which purports" "to ascertain the true knowledge of the witnesses; and only those questions are prohibited which tend to perplex the witness, or to induce them to make untrue statements."

The affidavit of the defendant's attorney further stated that, in consequence of information obtained at *Berlin*, he went to *Hamburgh*, and there saw a witness whose evidence he believed would be material, but who refused to go to *England*, stating at the same time his willingness to give evidence before a commissioner at *Hamburgh*. That the deponent was informed, by an eminent lawyer at *Hamburgh*, "that there would be no difficulty, by reason of any interference of the courts or authorities there; but that a commission issuing out of the Court of Queen's Bench might be addressed to him as commissioner, and that the return thereto might be made by him without any difficulty, if the examination of the witness or witnesses were by written interrogatories." The attorney further deposed that the witnesses referred

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Sir F. Thesiger, Hoggins and J. W. Huddleston now shewed cause. The plaintiff is, at any rate, not responsible for the failure of the first commission: it does not appear that he required to examine any witnesses: it is true that he joined in the commission; but that was done to entitle him to cross-examine, a doubt having been suggested, on the authority of *McCombie v. Anton* (a), whether he would not have been precluded from so doing if he had not joined. The failure was occasioned, in some sense, by the defendant, who ought to have obtained information as to the *Prussian* law, which, it now appears, is entirely opposed to the *English*, in not allowing examination or cross-examination by counsel, and in preventing examination as to handwriting. These are important differences, which, indeed, seem to render it altogether impossible to carry out the provisions of stat. 1 W. 4. c. 22. s. 4., if the examination must be conducted, not by the *English* commissioner, but by a *Prussian* judge acting according to his own law, which substantially differs from the *English*. Upon the defendant's affidavit, it appears that any commission to *Berlin* must fail, upon these grounds; and the Court will not direct that to be done which must be abortive. But, if a commission is to issue, can it go to a *Prussian* judge? And, if it does not, how can the *Prussian* judge have any power, which will give validity to the proceeding, so as to make the evidence admissible? In *Clay v. Stephenson* (b) this

(a) 6 *Scott's N. R.* 923.

(b) 3 *A. & E.* 807.

Court directed a commission to be directed to the members of the *Hamburgh* Court of *Handelsgericht*; but this was meant by the Court to be directed, not to the *Hamburgh* Court, but to the individuals composing it, as appears by the remark of *Patteson* J. in the second case of *Clay v. Stephenson* (a). [Lord *Campbell* C. J. Possibly the *Prussian* judge, though acting under the *Prussian* law, may still do so as in execution of our commission.] The statute does not authorize the taking of any examination except in conformity with *English* law; and this Court has therefore no jurisdiction to direct a commission to act upon rules contravening the *English* law. [Lord *Campbell* C. J. By sect. 4 we may "give all such directions touching the time, place, and manner of such examination," "and all other matters and circumstances connected with such examinations, as may appear reasonable and just."] According to Mr. *Geppert's* account of the *Prussian* law, hearsay evidence might be admitted at the discretion of the judge. [Lord *Campbell* C. J. I do not know that there is any violation of justice in requiring the questions to be put through the judge: at a court martial, where justice is very carefully dispensed, the questions are put through the president.] At any rate, the defendant must pay the costs of the previous commission; *Boelen v. Melladew* (b). Then, as to the commission to *Hamburgh*, it appears probable that similar difficulties will arise: the witnesses, coming, it may be, from different *German* states, may be called on to give evidence in conformity with as many different systems of law. [*Erle* J. By sect. '7 of stat. 1 W. 4. c. 22. any person wilfully giving false evidence

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(a) 7 A. & E. 185. 188.

(b) 10 Com. B. 898.

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is indictable for perjury: how could that be made applicable to the case of a foreigner giving evidence according to foreign law in foreign parts?] That creates a material difficulty: but it may, perhaps, be answered, on the other side, that this difficulty applies to all evidence given in a foreign country. [*Crompton J.* The section certainly seems to be inapplicable where no oath or affirmation, according to our law, is taken.] The difficulty at any rate shews the importance of watching the proceeding very strictly.

Sir *A. J. E. Cockburn*, Attorney General, contra. The *Berlin* commission must be addressed to a judge there; otherwise the proceeding will be illegal by the *Prussian* law. In this there is nothing inconsistent with the statute: and indeed, upon the principles maintained on the other side, it is not easy to see how a commission can be executed without Her Majesty's dominions. The mode of examination may vary from the *English*; but probably it will turn out that there is sufficient identity of principle between the two systems to render the details unimportant; or at any rate the difference may be one only of degree. [Lord *Campbell C. J.* The statute will reach a *British* subject committing perjury in a foreign country. We certainly do legislate so as to make some acts done in foreign countries penal here, as in the cases of murder and slave trading. But then our legislation applies only to *British* subjects.] In all civilized countries there is some punishment for wilful false evidence; in *Boelen v. Melladew* (a) there was an affidavit as to the *Danish* practice in this respect. The

(a) 10 Com. B. 898.

difficulty which occurred in *Clay v. Stephenson* (a) is met by the alternative suggested in the rule; and this is in conformity with the precedent in *Ponsford v. O'Connor* (b). The Court has to determine whether the convenience of granting this application does not outweigh the inconvenience. [*Creasy* and *Willes*, on the same side, were stopped by the Court.]

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LORD CAMPBELL C. J. The commission prayed for may issue on payment of the costs of the first commission. I should be desirous of giving effect to the defendant's application, if we can; for otherwise important evidence will be excluded. It is obvious that the evidence of *Johanna Wagner* must be material (c). Then have we the power? As at present advised, I think we have. We should send the commission, not to the foreign Court, but to some of the individual members who constitute that Court. It is objected that the *Prussian* mode of conducting examinations is erroneous, according to the principles of our law. Giving to this objection all its weight, I think it ought not to prevail. We cannot assume, upon the materials before us, that in fact there will be any thing done or omitted, contrary to the law of *England*. If, when the examinations are returned, they appear on their face to have been taken contrary to *English* law, or if extrinsic evidence be given that this has occurred, the objection may be taken at *Nisi prius*. And, again, if we are exceeding our power in issuing this commission, a bill of exceptions may be tendered at *Nisi prius*, and the opinion of the House

(a) 3 A. & E. 807; 7 A. & E. 185.

(b) 5 M. & W. 673.

(c) See the declaration; *Lumley v. Gye*, 2 E. & B. 216.

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of Lords may be taken. I think, therefore, that we shall do well to issue the commission. As to the mode of hearing the examinations, that cannot alone be made an objection. If improper questions are admitted, or proper questions not allowed to be put, the Judge who tries the case may repudiate the evidence, either wholly or in part, as the case may be. I agree with the decision, in *Boelen v. Melladew* (a), that the costs of the previous commission must be paid by the defendant.

COLERIDGE J. I am of the same opinion. The question is one of much novelty, and of immense importance. I own that I am much influenced by my Lord's argument, that by issuing this commission we put the question into a course for reviewal, whereas, by refusing it, we should conclude the question at once. No doubt we are issuing a commission to take examinations upon oath at a place out of our jurisdiction. The objections are: first, that we have no jurisdiction in the place; secondly, that the commission will be ill executed. As to the first objection, it might be made to any commission to be executed abroad: whatever is done abroad must be voluntary. As to the second objection, I cannot say I attach much weight to it. Either the examinations, when returned, will not be receivable, and the Judge at *Nisi prius* will exercise his judgment in rejecting them, or they will satisfy the requisites of *English* law. We cannot anticipate that faults will occur which will make the whole void. But then it is said that the *Prussian* law of evidence is objectionable. What do we ourselves do? In questions of life and death we receive the evidence

(a) 10 Com. B. 898.

of an absent witness, if he is so ill as to be unable to attend (a): in that case, his deposition is admitted. And is not the suggested mischief much exaggerated? The effect of the evidence is open to the remarks which counsel may make to the jury, as to the peculiar circumstances under which it has been taken. On the balance of convenience and inconvenience, I think we ought not to refuse this application.

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ERLE J. I think the commission ought to issue. Any examinations taken before any commissioners are within the statute; they may therefore be taken before any person described by name or office. It is most important not to exclude evidence. Does the fact that, on the first commission, the examination was conducted according to the *Prussian* law of evidence raise a presumption that truth will be prejudiced? In my opinion it does not. If any thing is done contrary to the law of *England*, the objection may be raised at Nisi prius.

CROMPTON J. We clearly have power to issue this commission, under stat. 1 *W.* 4. c. 22. s. 4. I agree to the distinction, insisted on by Mr. Justice *Patteson* in *Clay v. Stephenson* (b), that it should be directed to individuals, not to a Court, and must be executed by the commissioners as individuals, except so far as the mode of taking the oath is concerned, as to which no objection appears now to be made. The Attorney General very properly points out that the question is as to the balance of convenience and inconvenience. The case comes back to the ordinary practice: if any

(a) See stat. 11 & 12 *Vict.* c. 42. s. 17.

(b) 7 *A. & E.* 188.

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Lord CAMPBELL C. J. We should like to see the commission, before it issues: it should be so framed as not to intimate any thing like disrespect to the foreign authorities. Let it be drawn in four days, returnable in a month, with power to a Judge at chambers to extend the time.

No rule was ever drawn up.

Saturday,
January 14th.

EBENEZER ALSTON *against* JOHN GRANT and
 DANIEL GRANT.

If the owner of land, on which is a house, construct on the other part of the land a sewer, and let the house, and afterwards, by reason of the original faulty construction of the sewer, and the continued user of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed.

THE first count alleged that, before and at the time of the committing of the grievances next mentioned, plaintiff was possessed of a house, with a cellar under the same, and thereto belonging, situate at &c., and in which said house and cellar plaintiff then carried on his trade of a grocer. And, whereas, before the time of the committing of the said grievances, defendants had, for their own accommodation and convenience, made and constructed, and at the time of the committing of the said grievances kept and continued, so made and constructed, a certain sewer or watercourse, in and under a certain street or highway near to the said house and cellar of plaintiff, and which said sewer or watercourse was, at the time of the committing &c., under the management and control of the defendants, and into which said sewer or watercourse defendants, from

time to time, before and at the time of the committing &c., caused and permitted large quantities of water to flow, which said water then flowed and passed in and along the said sewer or watercourse, and near to the said cellar of plaintiff, of all which defendants, before and at the time of the committing &c., had notice: yet defendants, not regarding their duty &c., so negligently, insufficiently and improperly made and constructed the said sewer or watercourse, and, at the time of the committing &c., kept and continued the same so negligently, insufficiently and improperly made and constructed, and in such an insufficient and improper state, and did also, at the said time, so negligently and improperly manage the said sewer or watercourse, and cause and permit such large and unreasonable quantities of water to flow into the same, that, on 5th *February* 1851, divers large quantities of water penetrated and burst through, and flowed out of and from, the said sewer or watercourse of defendants into the said cellar of plaintiff, and then greatly damaged and injured the same, and also then damaged and destroyed divers large quantities of groceries and other goods of plaintiff then lawfully being in the said cellar, in the way of the plaintiff's said trade.

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There was a second count making a similar complaint as to two houses of plaintiff, laying the damage by the water on 4th *February*, 1852.

Plea: Not guilty. Issue thereon.

On the trial, before *Erle J.*, at the *Liverpool* Summer Assizes, 1853, it appeared that the defendants were owners of two houses occupied by the plaintiff as their tenant; he having taken from them one house in 1845,

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and the other in the summer of 1851. About twenty years ago, the defendants, for their own accommodation and convenience, constructed a sewer, which carried off the water from a reservoir belonging to them: and they had since then kept and continued it for their own accommodation and convenience, down to the *February* of 1852. In *February* 1851, the water from this sewer flowed into the cellars of the house so constructed, occupied by the plaintiff; and again, in *February* 1852, the water flowed into the cellars of both the houses then occupied by him. On each occasion, much damage was done by the water: and, for the plaintiff, it was contended that this was owing to the faulty construction of the sewer. The counsel for the defendants contended that, even supposing this to be so, the plaintiff had no cause of action against the defendants, he having taken the houses from them with all their faults, and it not being suggested that he was ignorant of the state of the sewer. The learned Judge desired the jury to say whether the sewer was constructed with proper care and skill; and they found that it was not. His Lordship then directed a verdict for the plaintiff.

In *Michaelmas* Term, 1853, *Knowles* obtained a rule *Nisi* for a new trial, on the ground of misdirection.

Hugh Hill and *J. A. Russell* now shewed cause. It may be questioned whether the plea lets in the objection urged for the defendants. But, on the general merits, the defendants are responsible. The plaintiff, though he had but a limited interest derived from the defendants, had, during the continuance of such interest, the same right against them as he would have had if he had

purchased the fee from them. In *Tenant v. Goldwin* (a), where it was decided that the owner of a house may maintain an action against the owner of the adjacent house for default of a party wall between the two which the latter is bound to repair, Lord *Holt* says: "If a man has two houses contiguous, and one has a house of office, which is separated from the cellar of the other by the wall, which keeps in the filth of the house of office, and he sell that house, the vendee must keep in the filth of the house of office, so as it shall not run in upon the other house:" and he adds: "and it would have been all one if the vendor had sold the house with the cellar, then he must have kept the wall of the house of office so as to have kept the filth in; for every man must take care to do his neighbour no damage." There can, as to this, be no difference between letting and selling. The general principle, that no one shall derogate from his own act, applies. The right of an occupier to recover against his neighbour for negligence occasioning damage is illustrated by *Vaughan v. Menlove* (b). In *Cooper v. Barber* (c) *Lawrence J.* held that, if an owner of land has had immemorially a watercourse whence the water penetrates into his neighbour's soil, doing no visible harm, and the neighbour afterwards builds a house which is injured by the water, an action lies.

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Knowles and *Holland*, contra. No time can be pointed out at which the defendants did an unlawful act. They had a right to make the sewer, however faultily, while it injured only their own property: and they were entitled to subject the two houses, before they were let,

(a) 2 *Ld. Raym.* 1089; *S. C.* 1 *Salk.* 21, 360. (b) 3 *New Ca.* 468.(c) 3 *Taunt.* 99.

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to the inconvenience. They incurred no new duty by letting the houses. In *Gale on Easements*, p. 51 (2d edit.), it is said, speaking of servitudes: "To clothe with right this permanent alteration of the qualities of two heritages, the consent of the owner of the servient tenement, in the manner appointed by law, is necessary; but where the land benefited and the land burthened belong to the same owner, he may change the qualities of the several parts at his will, and his express volition evidenced by his acts must at least be as effectual to impress a new quality upon his inheritance as the implied consent arising from his long continued acquiescence." Suppose a man, having a manufactory which would be a nuisance to any one dwelling on his land, but to no one else, lets off a part of the land: can the lessee complain of the nuisance? [Lord Campbell C. J. Do you suppose the nuisance to arise from an improper use of the manufactory?] Suppose it improper, so far as concerns the creation of the nuisance. The lessor of a house is not bound, as between himself and his lessee, to perform all the repairs which he cannot call on the lessee to perform; *Arden v. Pullen* (a): nor, though he must not practice deceit, is he bound to disclose to his lessee the ruinous state of the house, unless indeed he knows that the lessee takes the house in consequence of a belief that it is sound; *Keates v. Earl Cadogan* (b), *Hart v. Windsor* (c). If the defendants here had bought the house while their sewer existed, the union of the property would have put an end to any right of the purchased house to be protected from the sewer: then, if the house were let again, it would

(a) 10 M. & W. 321.

(b) 10 Com. B. 591.

(c) 12 M. & W. 68.

be let without the right; *Robins v. Barnes* (a). The decision in *Tenant v. Goldwin* (b) is inapplicable: but Lord *Holt's* dictum is relied on. Possibly, in the case of a privy, where the nuisance is augmented by continual new creation of filth, the law may be as there suggested: Mr. *Gale*, however, appears to consider the dictum as questionable, on the principles of *English* law, and suggests that it was founded on the civil law. The defendants were bound to keep the sewer in as good repair as it was in at the time of the letting: but that duty does not carry with it a liability to make it more sound than it was when first constructed; *Regina v. Cluworth* (c). If there was no nuisance at first, there cannot, after the letting, be a nuisance by relation; *Rich v. Basterfield* (d).

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Lord CAMPBELL C. J. I am of opinion that this rule must be discharged. Mr. *Knowles's* reasoning would have been conclusive except for the fact that the sewer was improperly constructed. Had the sewer been made, before the houses were let to the plaintiff, in the way in which a prudent man would deal with his own property, then, whatever inconveniences followed, the lessee must have submitted to them. But here the sewer was improperly constructed at first: and, when the defendants let the house, a duty was imposed upon them of not allowing that to continue which till then had been rightful. To do so was a derogation from their own act in letting. To keep the sewer in a dangerous state, when it could be remedied, was a wrong, giving a right of action; and the plaintiff purchased the right of

(a) *Hob.* 131 (5th ed.).(b) 2 *Ld. Raym.* 1089.(c) 1 *Salk.* 359.(d) 4 *Com. B.* 783.

1854. enforcing this. Lord *Holt's* authority seems to me
ALSTON express. When the houses were in the same hands, no
V. duty could arise: but a duty arose when one house was
GRANT. sold. It cannot be said that, when the houses were in
possession of the same person, any new quality was
impressed upon either, and that the purchaser of the
one was ever after to submit to the nuisance. Lord
Holt's illustration, which I take to be good law, applies:
and the continuance of a sewer, improperly constructed,
is a wrong for which an action lies.

CROMPTON J. (a). I am quite of the same opinion.
The action is brought against a neighbour for the way in
which he keeps a sewer. It is admitted that he kept and
continued it as originally constructed. That is a legal
mode of saying that he does more than legally let it alone;
he continues the use of it. He is therefore *prima facie*
liable. Then it is suggested that the houses injured once
belonged to the defendants, and were let by them to the
plaintiff. Had the plaintiff agreed to take the houses
with all nuisances, that should have been pleaded: but
I do not see how that could be. An analogy seems to
be suggested from the law of easements. When a party
enjoys two houses, and then grants one away, it is
generally implied that he grants all easements necessary
for the enjoyment of the house granted. Mr. *Gale*
appears to treat this as a grant created or implied by
necessity. But that is not at all like the case where a
party keeps in his hands a nuisance: the right to have
water flowing into a neighbour's house from an ill con-
structed sewer is nothing like an easement. The case

(a) *Coleridge J.* had left the Court.

therefore is quite different from those which have been decided upon the implication arising from the grant of a dominant tenement. The Judge, therefore, left this case rightly to the jury; for it was agreed that the sewer was kept and continued as it was originally constructed.

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ERLE J. This is an action arising upon the rights of drainage. The plaintiff, though tenant to defendants, had as against them the rights of an ordinary neighbour. It seems to me that a right is cast on one neighbour not to injure another in his ordinary enjoyment. The plaintiff had a cellar filled with goods: his ordinary enjoyment of that included its not being filled with water. The defendants bring water down a sewer: that they might do: but, if ordinary care is not taken, and by reason of such want of care the water gets into the plaintiff's cellar, and does damage, it seems no answer to say that the plaintiff came into the house with the knowledge that the nuisance was going on. If a consent on the part of the plaintiff had been set up, there would have been a question for the jury: but there was no ground for thinking that the plaintiff expected his cellar to be overflowed.

Rule discharged.

1854.

Thursday,
*January 16th.**TURNNEY against DODWELL.*

Where a bill of exchange has once been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill: the promise implied from such delivery not being, within the meaning of stat. 9 G. 4. c. 14. s. 1., "an acknowledgment or promise by words *only*," and the word "payment" in the proviso in that section being used in the popular sense, so as to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking of it in satisfaction of the debt.

FIRST count on a promissory note, by payee against maker. Second count on a bill of exchange, by drawer against acceptor. Pleas: To first count, the Statute of Limitations. Issue thereon. To the second count, payment into Court; which plaintiff took out of Court.

On the trial, before *Jervis C. J.*, at the last *Bedfordshire* Summer Assizes, it appeared that the note was more than six years due, but that, within six years, the plaintiff drew the bill, the subject of the second count, and the defendant accepted it on account of part of the debt due upon the note. The learned Judge, in his report of the trial to the Court, stated that, it being admitted "that the bill was given as a part payment of the note," he was of opinion that the plea of the Statute of Limitations was answered, and directed a verdict for the plaintiff, with leave for the defendant to move to enter a verdict for him. It was however agreed, by the counsel on both sides, that the admission at the trial was that the bill was given and taken, in the ordinary way, on account of part of the consideration of the note, and not in absolute satisfaction of so much of it; and that the learned Judge in his report must be taken to have used the word payment in that sense.

O'Malley, in last *Michaelmas* Term, obtained a rule Nisi according to the leave reserved.

D. Power and *Wroth* now shewed cause (a). Anything taken in reduction of the debt is payment; *Hooper v. Stevens* (b), *Hart v. Nash* (c). [*Erle* J. There can be no doubt of that, if the bill was taken in payment, in the sense that it was accepted by the creditor as equivalent to so much money. How was the fact?] (The report of the Chief Justice was referred to; but it was explained, as before stated, that the bill was taken on account of part of the debt, and not as an absolute satisfaction of it.) The taking of a bill on account of part of the debt takes the case out of the Statute of Limitations. Before Lord *Tenterden's* Act (9 G. 4. c. 14.) it clearly would have done so, as being an acknowledgment from which a new contract to pay would be implied; *Tanner v. Smart* (d). Then stat. 9 G. 4. c. 14. s. 1. enacted "that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract" for this purpose. But the acknowledgment by giving a bill is not "by words only;" *Cleave v. Jones* (e). The section then contains a proviso "that nothing herein contained shall alter or take away or lessen the effect of any payment" of part of a debt. At all events, when the bill was satisfied by the payment into Court, it became a satisfaction of part of the debt upon the note; and payment of a bill relates back to the time of giving the bill; *Irving v. Veitch* (g). In *Gowan v. Forster* (h) it was held that the implied promise was at the time of the giving of the bill; and,

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v.
DODWELL.

(a) Before Lord Campbell C. J., Coleridge, Erle and Crompton J.

(b) 4 A. & E. 71.

(c) 2 C. M. & R. 337.

(d) 6 B. & C. 603.

(e) 6 Exch. 573.

(g) 3 M. & W. 90.

(h) 3 B. & Ad. 507.

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that being out of time, the plaintiff failed. A bill given "on account" of a debt, as the words were understood in *Kearslake v. Morgan* (a), is payment within the ordinary use of the word; *Maillard v. The Duke of Argyle* (b), *Griffiths v. Owen* (c), *Belshaw v. Bush* (d). Giving a bill of exchange, without notice of an act of bankruptcy, was a payment, protected under the old Bankrupt Act, 1 Ja. 1. c. 15. s. 14.; *Wilkins v. Casey* (e); that is, when made on account of a debt, according to the limitation laid down in *Bishop v. Crawshay* (g).

O'Malley, in support of the rule. In all the cases referred to in which the giving of a bill has been held to take a case out of the statute, the bill has been honoured. In such a case it is not disputed that there has been a part payment. It is said that the payment into Court is equivalent to honouring the bill: but a payment or acknowledgment in any shape takes the case out of the statute, because a fresh contract arises; and, supposing that a promise can be implied from payment into Court, it is a promise after action commenced and too late; *Bateman v. Pinder* (h). The real point, therefore, is whether, when a bill is given on account of a debt, and dishonoured, that is payment. If taken absolutely in satisfaction, so that the remedy is on the bill alone, and no longer on the consideration, as is often the case where the bill is the acceptance of a third party, doubtless it may be payment; especially where the creditor has made

(a) 5 T. R. 513.

(c) 13 M. & W. 58.

(e) 7 T. R. 711.

(b) 6 M. & G. 40.

(d) 11 Com. B. 191.

(g) 3 B. & C. 415.

(h) 3 Q. B. 574.

the bill his own by laches; but in the present case the defendant could not have proved a plea of payment. It seems not within the exception in stat. 9 G. 4. c. 14. s. 1.; *Gowan v. Forster (a)*, *Foster v. Dawber (b)*.

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Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*January 27th*), delivered judgment.

The only question in this case was, Whether a part payment by a bill of exchange drawn by the plaintiff and accepted by the defendant was sufficient to take the case out of the Statute of Limitations? The circumstances, under which the acceptance was given, were such as to shew that the payment was made as a part payment of the whole amount due, so as to raise the implication of a fresh promise, and therefore to be an answer to the defence of the Statute of Limitations, if the part payment by bill were a part payment within stat. 9 G. 4. c. 14. It was said on the part of the defendant, and we think correctly, that we ought to assume that the payment in question was not an absolute payment in satisfaction, so as to be a discharge if the bill were dishonoured. If the payment had been one in absolute satisfaction, no question could have arisen: and we have therefore to consider whether this payment, in the usual manner in which bills of exchange are given and taken in payment, is a payment within the proviso of stat. 9 G. 4. c. 14. s. 1., by which the effect of part payment is preserved. The counsel for the defendant referred us to the case of *Gowan v. Forster (a)*, where a doubt was expressed as to whether the drawing of a bill was a sufficient acknowledgment within stat. 9 G. 4.

(a) 3 B. & Ad. 507.

(b) 6 Exch. 839.

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c. 14., and to the case of *Foster v. Dawber* (a), where the Court of Exchequer thought that, under the circumstances, no promise to pay any balance could be implied in the particular case: but there is nothing to shew that they thought that a part payment by bill might not be an acknowledgment to take the case out of the Statute of Limitations as to the remainder. On the other hand, in the case of *Irving v. Veitch* (b) the expressions used by the learned Barons lead us to suppose that they thought such part payment by bill sufficient. In both *Gowan v. Forster* (c) and *Irving v. Veitch* (b) it was unnecessary to determine the point now in question, as the Courts, most properly, held that the acknowledgment, if any, was at the time of delivering the bills in part payment, and not at their subsequent payment by the parties on whom the bills in those cases were drawn. At the trial in the present case, the Lord Chief Justice of the Common Pleas held that the part payment was sufficient to take the case out of the Statute of Limitations: and we entirely concur in that ruling. Before stat. 9 G. 4. c. 14. such a part payment was clearly sufficient to take the case out of the Statute of Limitations, as amounting to an acknowledgment of the balance being due; and the real question is, whether such payment by bill, though not received in absolute satisfaction, is not a payment within the proviso in that statute. The effect of giving a bill of exchange on account of a debt is laid down by Mr. Justice Maule in the recent case of *Belshaw v. Bush* (d), approving the doctrine of the Chief Baron in *Griffiths v. Owen* (e) and of Baron

(a) 6 Exch. 839.

(b) 3 M. & W. 90.

(c) 3 B. & Ad. 507.

(d) 11 Com. B. 205.

(e) 13 M. & W. 64.

Alderson in *James v. Williams* (a). In all those authorities such a delivery of a bill is laid down as a *conditional payment*. We do not see why its immediate operation, as an acknowledgment of the balance of the demand being due, is at all affected by its operation as a payment being liable to be defeated at a future time. The statute intending to make a distinction between mere acknowledgments by word of mouth and acknowledgments proved by the act of payment, it surely cannot be material whether such payment may afterwards be avoided by the thing paid turning out to be worthless. The intention, and the act by which it is evinced, remain the same.

We think that the word *payment* must be taken to be used by the Legislature in a popular sense, and in a sense large enough to include the species of payment in question: and we should think the acknowledgment of liability as to the remainder of the debt not at all altered by the fact of the notes by which it was paid turning out to be forged, or of the coin turning out to be counterfeit. In all these cases the force of the acknowledgment is the same; and the payment is, we think, a sufficient payment within the words of stat. 9 G. 4. c. 14. In *Maillard v. The Duke of Argyle* (b) the Court of Common Pleas distinctly held that the word *payment*, as applicable to a transaction of this kind, even where used in a plea, did not mean payment in satisfaction, but might be treated as used in its popular sense; and Mr. Justice *Maule* in that case says: "Payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises. When you speak of paying in cash, that

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(a) 13 M. & W. 828, 833

(b) 6 M. & G. 40.

1854. means in satisfaction, but when by bill, that does not import satisfaction, unless the bill is ultimately taken up." In *Belshaw v. Bush* (a) the Lord Chief Justice of the Common Pleas, in speaking of a transaction of this nature, says: "The real answer is, that, upon this record, you have been paid your debt;" and in the very report now before us the learned Lord Chief Justice calls the present transaction a part payment.

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In mercantile transactions nothing is more usual than to stipulate for a payment by bills where there is no intention of their being taken in absolute satisfaction. We are satisfied that a transaction of this nature is properly described by the word payment, and that it is clearly within the class of acknowledgments intended to be unaffected by the statute; and we are satisfied that there is no reason whatever to restrict the expression in the statute to that species of payment which imports a final satisfaction. The defendant's case, which rested entirely on the proviso in stat. 9 G. 4. c. 14. s. 1. being so restricted, therefore fails in its foundation: and we think that, where a bill of exchange has once been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards takes place as to the bill.

The ruling of the Lord Chief Justice at the trial being in our opinion perfectly correct, this rule must be discharged.

Rule discharged.

(a) 11 Com. B. 197.

1854.

The QUEEN *against* JOHN HARTLEY.Monday.
January 16th.

MANISTY, in last Term, obtained a rule Nisi calling on *Hartley* to shew cause why an information in the nature of Quo warranto should not be filed against him for the office of councillor of the borough of *Wakefield*, *Yorkshire*.

Where a person wrongfully elected to a corporate office has accepted it, so that the office is full, the Court will not, in making a rule absolute by his consent for a quo warranto, make it one of the terms that the relator should bear the expences of the information and disclaimer, though the person in possession of the office does not defend it, and offers to undertake to disclaim if required.

C. Mihoard, on behalf of the defendant. The defendant now admits that, through a miscarriage on the part of the presiding officer, the election was void. He therefore does not oppose the rule being made absolute, with costs up to the present time; but, as he is willing to resign or disclaim, the Court will make it one of the terms of the rule that any further proceedings should be at the cost of the relator. This was done in *Regina v. Morton* (a). [*Crompton J.* That case has been departed from in *Regina v. Sidney* (b), before my brother *Erle*, in the Bail Court, and in *Regina v. Earnshaw* (c), in the full Court. The reason is that, the office

(a) 4 Q. B. 146.

(b) 2 L. M. & P. 149.

(c) In this case, Sir *F. Thesiger*, Attorney General, in *Michaelmas* Term 1852, had obtained a rule to shew cause why an information in the nature of a Quo warranto should not be issued against *Earnshaw* for exercising the office of councillor of the borough of *Oldham*. *Cowling*, in *Hilary* Term (January 29) 1853, shewed cause, and proposed that the rule should be made absolute, with costs up to the present time, and that defendant should be allowed to disclaim or resign. He mentioned, besides the cases cited in the text, an unreported case of *Regina v. Appleyard* (29th January, 1851), and suggested that there was no plenarty. Sir *F. Thesiger*, contra, was not called on. *Per Curiam* (Lord *Campbell* C. J., *Coleridge* and *Wightman* Js.). There can be no resignation, except upon the assumption that the party resigning is in office. Rule absolute, in the ordinary terms.

1854. being full, there must be a formal information and ouster to set the corporation right: and then the costs of an information and ouster are regulated by statute. We have no power to deprive the relator, who has committed no fault, of the costs which the law gives him. Lord *Campbell* C. J. I should be much inclined to assist the defendant to retire without further expence, as he seems innocent; but we cannot do it.]

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v.
HARTLEY.

Per CURIAM (a). The rule must be absolute, without any terms.

Rule absolute.

(a) Lord *Campbell* C. J., *Coleridge*, *Erle* and *Crompton* Ja.

CATHERINE DANSEY *against* ELIZABETH FRANCES
RICHARDSON.

Declaration,
that defendant,
being a board-
ing house-
keeper, re-
ceived plaintiff with her baggage, for reward, as a guest in defendant's house, on the terms, amongst others, that defendant should "take due and reasonable care" of plaintiff's baggage, whilst in the house. Breach; that by negligence of defendant and her servants plaintiff's baggage was lost. Pleas: Not Guilty; and a traverse of the receipt on those terms. Issues thereon.

CASE (a). Declaration, averring that defendant kept a boarding house in which she was in the habit

On the trial, it appeared that plaintiff was received, with her baggage, as a guest; but nothing was expressed as to the care to be taken of the goods. The goods were stolen from the house whilst plaintiff was a guest; and there was evidence that the theft was facilitated by the defendant's servant having left the front door ajar: and there was also some evidence that defendant was aware of habitual negligence of the servant in this respect. The Judge told the jury that a boarding housekeeper was bound to take due and reasonable care about the safe keeping of the guest's goods: which he explained to be such care as a prudent housekeeper would take of the house for the purpose of protecting her own goods: that the leaving the door ajar might be a want of such care; but

(a) The pleadings in this case were made up before the Common Law Procedure Act came into operation.

"of receiving persons, accompanied by their baggage, apparel, goods and chattels, as guests, to be in the said house found and provided by the defendant with the use and occupation of rooms, apartments and furniture of the defendant's, and with meat, drink, servant's attendance and other necessities therein, for certain hire and reward, in that behalf to be therefore paid by such guests to the defendant." Averment: that plaintiff, at the request of "defendant so then keeping the said boarding house, came to and put up at the same, as such guest as aforesaid, and then brought with her unto the same certain personal baggage of her, the plaintiff, to wit" a dressing case. Averment: that plaintiff then became a guest on the terms that defendant was to provide plaintiff with rooms, &c., and "with meat, drink, servants, attendance and other necessities therein as aforesaid, and to take due and reasonable care of the said goods of the plaintiff whilst the same were in the said house and whilst the plaintiff was such guest therein as aforesaid, for hire and reward to the defendant in that behalf:" and that it then became the duty of the defendant to observe the terms so set out. Breach: that defendant and her servants so negligently conducted themselves that, through the negligence of defendant and her servants, the dressing case was lost.

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that the defendant was not answerable for such negligence in the servant, unless she had herself been guilty of some negligence, as in keeping such a servant with knowledge of his habits. Verdict for defendant on Not Guilty: for plaintiff on the other plea.

On a rule for a new trial: Held, by the whole Court, that a boarding housekeeper is not bound to keep a guest's baggage safely, to the same extent as an innkeeper; but that she undertakes, by implication of law although nothing is expressed, to take due and proper care of a guest's

baggage; and that neglecting to take due care of the outer door might be a breach of such duty, and that so far the direction was right.

Erle J. and Wightman J. held that, unless the defendant herself was guilty of negligence, the act of the servant, in leaving the door ajar, was not one for which defendant was responsible; it not being a neglect of any public duty which was owing to plaintiff, and not being a breach of a contract between plaintiff and defendant, but merely negligence of the servant towards his mistress: and that therefore the direction was right.

Coleridge J. and Lord Campbell C. J. held that the act of the servant was, under the circumstances, the act of the defendant; and that there was no distinction between the personal negligence of the defendant, and that of her servant in her employment, the defendant being equally answerable for both: and therefore they held that the direction was wrong.

The Court being equally divided, no new trial was granted.

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1854. Plea 1. Not Guilty. 2. That defendant did not
 DANSEY keep such boarding house in manner and form &c.
 v. 3. That plaintiff did not become such guest in manner
 RICHARDSON. and form &c. 4. That plaintiff and her goods were not
 received on the terms in the declaration mentioned.
 On which issues were joined.

On the trial, before *Erle J.*, at the *Middlesex* Sittings in *Hilary* term 1853, it appeared that defendant kept a boarding house, and plaintiff became a guest of defendant, but that no terms were named as to care being taken of her luggage; that her dressing case was stolen; and there was evidence, to go to the jury, that the thief got at the dressing case by entering through the front door of the house, which defendant's servant had left ajar when going on an errand for plaintiff: and there was also evidence, to go to the jury, that the leaving of the door ajar was habitual negligence on the part of the servant, and that defendant had kept him, knowing that he was so habitually negligent. The details of this evidence will be found more fully stated in the judgment of *Coleridge J. (a)*. The counsel for defendant objected that there was no evidence of the terms, put in issue by the fourth plea. The learned Judge ruled that there was evidence. The case went to the jury: and the learned Judge, in substance, told them that a boarding house keeper had not the unlimited liability of an inn-keeper, but was bound to exercise due and reasonable care as to the guest's property, to the same extent which a prudent person would take of her own. The effect of the direction was to leave to them the question whether the goods were lost in consequence of the want

(a) *Post*, p. 157.

of such care on the part of the defendant: and, in explaining this, the learned Judge pointed out to them that the evidence was conflicting on three points: 1st. whether the loss was occasioned by the negligence of the servant in leaving the door ajar; 2d, supposing there was such negligence, whether the defendant was aware of any thing which made it negligent in her to keep that servant; and, 3d, whether the plaintiff herself was a party conducing to the loss. He told the jury that it would not be enough, to fix the defendant, if they thought the servant was so negligent, unless they answered the second question also in the plaintiff's favour; and that then the third questions would arise.

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v.
RICHARDSON.

Verdict for defendant upon the issue on the plea of Not guilty; for the plaintiff on the other issues.

Chambers, in the same term, obtained a rule Nisi for a new trial on the ground of misdirection.

In *Easter Term* 1853 (a), *Bramwell* shewed cause, and *Pearson* was heard in support of the rule. The Court directed a second argument: and, in *Michaelmas* term last (b), *Bramwell* shewed cause, and *Chambers* was heard in support of the rule. The judgments render any statement of the arguments unnecessary (c).

Cur. adv. vult.

(a) *April* 25th. Before Lord Campbell C. J. and Erle J.

(b) *November* 14th. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

(c) In addition to the authorities noticed in the judgment, the following were mentioned: 5 *Bac. Abr.* 366 (7th ed.). tit. *Master and Servant, and Apprentice* (K); *Middleton v. Fowler* (1 *Salk.* 282.); *Boson v. Sandford* (2 *Salk.* 440; *S. C.* 1 *Show.* 29.); *Barnes v. Ward* (9 *Com. B.* 392.); *Collett v. London and North Western Railway Company* (16 *Q. B.* 984.); *White v. Humphrey* (11 *Q. B.* 43.).

1854. In this term (*January 30th*), the Court being divided
DANSEY in opinion, the learned Judges delivered separate
v. judgments.
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Erle J. ERLE J. The declaration alleges that the plaintiff, with her goods, had been received by the defendant in a boarding house, on the terms, among other things, of taking due and proper care of the goods; and that they were lost by defendant's negligence. The material pleas are: The general issue, and a denial of receiving the goods on the terms alleged.

The facts, as far as they are material to the alleged misdirection, are, that the plaintiff with her goods had been received as a guest in the defendant's boarding house, on terms for board and attendance, in which terms no mention was made of goods; and that a servant, going out on a short errand for her, had left the front door ajar, through which a thief had entered and stolen her goods, namely a dressing case. As to this and other matters, there was conflicting evidence raising several questions of liability against the defendant.

The jury were, in effect, directed, as to the part of the case now to be considered, that the defendant was not bound to take more care of her house and the things in it than a prudent owner would take, and that, if, upon the conflicting evidence, they found that the door was negligently left ajar by the servant, but that this was the only evidence to fix the defendant with negligence, the plaintiff would fail. And I remarked that, if the defendant had taken the requisite care to have none but trustworthy servants, one act of such negligence on the part of a servant would not shew the want of the care of a prudent owner, as no care could guard against such an event.

The plaintiff objected that in this there were two misdirections. First: in stating that the keeper of a boarding house was not liable for a loss by theft if the sole ground of charge was that the negligence of a servant in thus leaving a door open had given a facility for the theft; and, secondly, in observing that, if requisite care had been taken by the defendant to have none but trustworthy servants, one such act of negligence by a servant, as was in question, would not prove want of the care which a prudent owner would take. And he contended: First: that the defendant must be liable for the loss by theft if the servant negligently left the door open: and, Secondly: that, "when-ever a master is liable for the act of a servant, it is contrary to the *English* law to enquire whether he took care to have none but trustworthy servants.

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With respect to the first point, he relied upon the liability of certain bailees for reward; such as wharfingers, agisters and hirers, who have the duty, arising from their contract of bailment, to keep the goods with care, and to deliver them again; and, if they, by their servants, to whom they may delegate their duty of so keeping, are guilty of negligence contrary to their duty, and the goods are lost thereby, they are responsible to the bailor for the loss. Thus, if the servant of the hirer, leaving the stable door open, or of the agister the gate of the field, or of the wharfinger the door of the warehouse, makes the master liable by reason of that negligence, he urged that therefore, by analogy, if the defendant's servant left the house door open, he made his mistress liable by reason of that negligence. Furthermore, he relied on the liability of masters for any act of wrong, causing damage to another, done by the

1854. servant in the course of his employ; such as a collision
in driving: and in considering this liability the care of
the master in choosing trustworthy servants is immaterial:
and the plaintiff urged that the omission of the defend-
ant's servant, by negligence, to shut the door was analo-
gous to the acts of wrong by servants, which, in this
class of cases, have made their masters liable for the
resulting damage; and that the care of the defendant to
have a trustworthy servant was therefore immaterial:
and so this was also a misdirection.

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But I am of opinion that there was no misdirection. The observations were made with reference to the conflicting evidence of the two parties, and were adapted to the different suppositions arising upon that conflict. The main principle was, that the defendant's duty was performed, if she took such care of the house and things in it as a prudent owner would take: this the plaintiff does not dispute. It seems to me to follow, that the direction first complained of is correct; it being an application of this principle. For the door might be left open, in the manner alleged, by a servant without any want of any degree of care on the mistress's part; seeing that the owner of a house cannot always be at the front door; and, when he is absent, the fact may occur notwithstanding every precaution on his part to prevent it. And, with respect to the second observation which is objected to, it was merely explanatory of the direction that there would be no liability for this act of negligence, but there might be liability if the evidence proved other grounds for charging the defendant. Now, if the direction as to non-liability was right, the observation explanatory of it was right; and, if it was not, the misdirection is established without reference to

this observation. I therefore pass it without further notice, and proceed to the substantial question, which is, Whether the keeper of a boarding house be liable to a boarder for the value of any goods stolen from the house, if the negligence of a servant, towards the mistress, such as an omission to shut the door according to her order, has given a facility for theft? Which question I answer in the negative, on the grounds that there is no precedent or principle establishing such a liability; and that there is no analogy between this case and either of the two classes of cases above mentioned.

First: the absence of any precedent establishing such a liability is strong to shew its non-existence; for, if it existed, the occasion for enforcing it must have often occurred. Boarding houses have been numerous: and it is reasonable to suppose that thefts in them have occurred, which were facilitated by the negligence of servants. Also, if the keepers of boarding houses would be liable on the grounds here alleged, so also would the letters of lodgings, the same reasoning applying equally to each; and yet no decision or dictum or treatise has been found to sanction the notion of this supposed liability, or to give a principle on which it could rest.

Secondly: there is no analogy between the present case and either of the two classes of cases relied on for the plaintiff. In the class of cases relative to certain bailees for reward, who are liable for the loss of the goods if they are stolen through the negligence of their servants, the goods are delivered to, and are in the possession of, the bailee, who, by the contract of bailment for reward, undertakes a private duty to the bailor to keep them with care, and to deliver them again; and this private duty is the test to ascertain whether any

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1854. alleged state of facts amounts to actionable negligence ;
 DANSEY for the question, whether given facts amount to action-
 v. RICHARDSON. able negligence, depends upon the legal duty owed to
 the party who affirms the negligence to be a breach of
 the duty owing to him by the opposite party. But, in
 the present case, there is no delivery of the goods of the
 plaintiff to the defendant ; there is no contract by the
 defendant to keep them with care and deliver them
 again ; there is no reward in respect of goods, the terms
 being the same for a boarder whether with or without
 goods ; there is no duty of keeping owing from defend-
 ant to plaintiff, and, consequently, no measure by which
 to try whether any given act, such as leaving a door
 open, is actionable negligence contrary to that duty.
 The goods of the plaintiff in this case remained in her
 possession and under her controul, and were disposed of
 by her as she chose, without notifying what she had
 done to the defendant. The bailee for reward has
 possession, and can apply care to guard, and undertakes
 to do so : the defendant had no possession and could
 apply no care to goods which she knew not of. The
 decisions that a bailee by deposit is not liable for a
 theft by his own servants unless there was negligence of
 himself, are in favour of the defendant : for she had not
 the same duty to keep with care as a depository has,
 not having had the possession. In *Foster v. The Essex
 Bank* (a), cited from *American* reports in *Story on Bail-
 ments* (b), and *Financier v. Small* (c), it appears that the
 servants of the depository stole the deposit, and the
 masters were held not liable. Now, if a depository is

(a) 17 Massachusetts Reports, 473.

(b) See notes 71, 88, 141 pp. 77, 206, 233 3rd ed. 1

(c) 1 Esp. N. P. C. 313.

not liable for an actual theft by his servant, it seems to me that he ought not to be liable for a theft facilitated by the negligence of his servants. In the other class of cases, relied upon by the plaintiff, where the master is held liable for the act of the servant, the servant has, in the course of his employ, caused damage by a misfeasance, in violating some public or private right of the complainant. The usual example of this species of liability is in cases of collisions on highways, there being a public right to the safe use of highways, and a correlative duty not to obstruct that use; and the master who, by himself or his servant, makes a wrongful collision, violates the public right, and is liable for the consequent damages; and, though this doctrine has been said to apply when the servant is guilty of an omission only, and the damage arises from an act of a stranger, as where the cart was left by the servant, and a stranger struck the horse, which backed into the plaintiff's window; *Illidge v. Goodwin* (a): still the true ground of the decision, as expressed by the Judge there, is that it is a misfeasance to place a horse and cart without attendance in a public street; and the damage was sufficiently connected with that misfeasance. Here, the defendant by her servant had been guilty of no misfeasance; the omission to shut the front door violated no public right of the plaintiff, and was in no sense an injury to her. Thus the supposed analogy between the present case and the cases of misfeasance by servants fails, from the difference of the acts complained of. It fails also in respect of the remoteness of the damage. In cases of collision the damage is immediate from the injury; but, in the present case, the thing complained of is the

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(a) 5 C. & P. 190.

1854. open door, which, by itself, was harmless; and the
DANSEY damage arose from the wilful trespass of a third person
v. who entered and stole; and therefore the supposed
RICHARDSON. analogy, between a mere omission to close a door and
Erie J. direct damage to person or property from wrongful collision, fails doubly.

The unlimited extent of the liability for unknown goods, and the impossibility to guard against all negligence in every servant, and the unreasonableness of charging a party for the loss of goods which he never was intrusted to keep, are strong against now imposing, for the first time, such an uncompensated risk on the keepers of lodging houses: and I know of no reason for imposing of it.

I therefore think that the plaintiff's rule for a new trial should be discharged.

Wightman J. WIGHTMAN J. This was an action against the defendant, who kept a boarding house, for the loss of a box belonging to a guest, through the negligence and want of reasonable care on the part of the defendant and her servants. The declaration alleged that the plaintiff became a guest in the boarding house of the defendant, on the terms, amongst others, that the defendant would take due and reasonable care of the goods of the plaintiff, whilst they were in the house of the defendant, for hire and reward to the defendant in that behalf; and that it then became the duty of the defendant, as such boarding house keeper, by herself and her servants, to take such due and reasonable care of the goods of the plaintiff whilst she remained as a guest with the goods in the defendant's house. No special terms were proved upon the trial; and it did not appear

that there were any beyond such as would be implied by law from the relation of boarding house keeper and guest, who was to pay for her board and lodging.

The declaration alleges that one of the terms was "to take due and reasonable care of the said goods of the plaintiff:" and the first question is, what degree of care, if any, is required by law of a boarding house keeper in respect of the property of a guest, which is no further in the care or charge of the boarding house keeper, either actual or by legal implication, than by being in the house. In the case of an innkeeper, the property of the guest is, by legal implication, in the actual care and custody of the innkeeper, who, by custom, is responsible for their safety at all events, with some rare exceptions. In the case of a bailee of goods to whom they are actually delivered, and who has the care and custody of them, as in the case of an agister of cattle, or the borrower of a horse, a certain degree of care is required in the keeping the property which they have in their possession: and, in some cases of bailment, the bailee is only bound to take as much care of the goods in his actual custody and possession as if they were his own. I can find no authority for holding that a boarding house keeper is a bailee of the goods of his guest at all, or that he is bound to take more care about the goods of his guest, which are no further given into his care than by being in his house with the guest, than he, as a prudent owner, would take with respect to his own. If he is bound to no more care than that, my brother *Erle's* direction seems to me to be perfectly right and well warranted by the evidence in the case. The utmost care of a prudent owner might fail from the unforeseen negligence or dishonesty of a servant, against which it

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might be impossible for him to guard. If he is guilty of negligence in the selection of his servants, or in keeping such as he may well distrust, he can hardly be considered as taking the care of a prudent owner, and on that ground might be liable for a loss occasioned by the servant's negligence.

It has been suggested that the defendant would have been liable, in case she had herself negligently left the door open, and the property of the plaintiff had been lost by such negligence: and that, if she would have been liable in case of her own negligence, she would be also liable for a loss occasioned by a similar negligence of her servants. I do not by any means agree to this. A prudent owner would *not* himself leave the street door open and expose his property needlessly to depredation; but the most careful owner cannot be secure against the negligence of his servants; all that he can do is to endeavour to secure such as are careful. I may add that this appears to be the first attempt to fix such a liability upon the keeper of a boarding house: at least no instance of such an action as the present was cited, founded, not upon any special terms agreed upon, but upon the mere relation of boarding house keeper and guest.

Upon the whole, it appears to me that there is no sufficient ground for the plaintiff to complain of the direction given to the jury by the learned Judge, and that the rule should be discharged.

Coleridge J.

COLERIDGE J. The declaration in this case, which has been already fully stated, alleges, by way of inducement, that one of the terms, on which the plaintiff became a guest in the boarding house of the defendant,

was that defendant would take due and reasonable care of the goods of the plaintiff, whilst they were in the house of the defendant, for hire and reward to the defendant in that behalf, and that it then became the duty of the defendant, as such boarding house keeper, by herself and her servants, to take such due and reasonable care of the goods of the plaintiff whilst she remained as a guest with the goods in the defendant's house: a breach of this duty is then assigned, and a loss of some of the plaintiff's goods by the neglect of the defendant and her servants to take such due and reasonable care. The pleas raise issues both upon the duty and the breach.

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It appeared in evidence that the defendant was the keeper of a boarding house, and that the plaintiff had been for some weeks her guest in it, paying between 2*l.* and 3*l.* per week. She had the use of sitting, drawing and dining rooms, in common with others, her own bed room, her board, and the attendance of the servants, among whom were a butler and page; and these, when required, went on errands for the guests, and carried their luggage to and from their rooms, when they arrived and departed.

On the 10th *December* in the evening, the plaintiff was to leave the house and to dine before she went. About half past five, being in her bed room, she was told dinner was ready, by one of the men servants, to whom she gave part of her luggage to take down stairs; and the other servant afterwards carried down the remainder: all were placed in the hall near the fore door. Shortly before her departure, she sent the butler out to a shop near for biscuits; and it was not seriously contested by the defendant's witnesses that this servant, going out, left the fore door ajar, and a thief, profiting

1854. by the opportunity, entered and carried off a box of the
DANSEY plaintiff's, containing valuable property. There was no
v. evidence whether the defendant had received a character
RICHARDSON. for carefulness with the butler when he entered her
Coleridge J. service. There was conflicting evidence whether he
had on former occasions left the door ajar, and, if so,
whether that was within the knowledge of the defendant;
and also whether any former robberies attributable
to the same cause had occurred.

Upon this evidence, it has been contended that the plaintiff should have been nonsuited, on the ground that there was no duty on the defendant to take such care of the plaintiff's goods as alleged in the declaration; but, unless it can be established that the defendant was not bound to take any care, it must be admitted she was bound to take due and reasonable care. It seems to me perfectly clear she was bound to take some care; and that my brother *Erle* was quite right in refusing to nonsuit.

The more important and more contested question remains: what was the extent of care which was due and reasonable under the circumstances, and whether the defendant has failed in the discharge of that which was incumbent on her. If we were to consider the cases of innkeeper and boarding house keeper on principle merely, it would seem that the latter would be required to take at least as much care of the goods of a guest as the former. Whether I am staying at an inn, or a boarding house, there is ordinarily neither more nor less of an express bailment of my goods to the master of the house: in both cases the custody of the goods, such as it is, is incident to myself being there as guest; and this is in consideration of valuable reward:

while in the case of the innkeeper there is, in the absence of any lawful excuse, a necessity to receive me, which does not exist in regard to the boarding house keeper. My being received into the house at all is owing to a purely voluntary contract, of which the reception of my goods is a necessary part (for it would be simply absurd to suppose my lodging in a house, and not bringing with me my clothes and articles of personal use); and a pecuniary reward is the consideration. The liability of the innkeeper, as indeed other incidents to his position, do not however stand on mere reason, but on custom, growing out of a state of society no longer existing; and I agree that it cannot be extended in all respects to the boarding house keeper. But the liability of this last must be measured by what is reasonable: he receives, for hire and reward, into his house a guest with clothes and personal chattels; he finds him servants to attend on him, or he attends on him himself; he supplies him with food, prepared by himself or his servants; and he reserves to himself the general controul of the house, and undertakes, in a general way, for its security from without. I do not know that, in measuring the liability resulting from these circumstances, it is necessary to reduce it under any one of the five heads enumerated by Lord *Holt* in *Coggs v. Bernard* (a); there may be no express or independent bailment reducible under any one of them: and yet there may be a liability where they sustain damage or are lost by the misconduct or negligence of the boarding house keeper. It seems therefore the right course, with a view to the present case, to enquire for what neglects a boarding house

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(a) 2 *Ld. Raym.* 909. See notes to *S. C.* in 1 *Smith's Lead. Ca.* 96.

1954. keeper will be liable if they are personally his own, and
then to see what difference, if any, it will make if they
are his servants'.

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Now, if the defendant here had neglected to give the plaintiff a dry bed, or wholesome food, and the plaintiff had become sick in consequence, if the defendant had by negligence lost the boots or shoes, or any articles of the plaintiff's dress, which, in the course of attendance on her, she had taken to clean, it cannot be doubted that she would have been liable to make recompence in damages. The defendant then, it must be admitted, was bound in her own person to exhibit ordinary care towards the plaintiff and her goods; for ordinary care would presumably have prevented any of these things happening. If now the jury, who decided the present case, had had to consider the character of what occurred in the defendant's house, supposing the defendant had been without servants, or had in the particular instance attended on the plaintiff herself, would they have thought that ordinary care had been exhibited? On this supposition the facts would have stood thus: the defendant, having placed the plaintiff's goods near to the fore door in the hall, goes out on a winter's evening, between five and six, when the light is gone, and leaves the fore door ajar in a street in *London*, whereby a thief has opportunity to enter and carry them away. Could a jury have said that that was an act consistent with ordinary care? If the door was purposely left open, was it or not reckless so to do? If unintentionally, was it or not the neglecting of a very simple and easy piece of caution, the ascertaining whether it was open or shut? I need not say what the answer of the jury must have been: it is enough that, under such circumstances, it

would have been a proper question for their consideration.

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But it will be said that, in fact, here the negligence was the act of the servant. And therefore we are to see next what difference that makes in the case. Waiving for a moment the question of liability, I think it must be admitted that the quality of the act itself will not be altered by a change of the agent: if it would have been negligence in the mistress, it will not be less negligence in the servant; if it would have been no answer, in the case of the former, that she had always before and in all other respects been very careful, and that this was a single instance, so in respect of the servant, and as against him, the same excuse would not have availed. The mistress might have deserved the character generally of a prudent housekeeper, and the servant of a careful domestic; yet, if, in the particular instance, either had been negligent, and thereby injured the plaintiff, each must have answered in damages. This rule must prevail wherever on the maxim of respondeat superior the master is answerable for the servant, whether in the way of commission or omission. In no such case can the master excuse himself by shewing the care he had taken in the selection of this servant, or that servant's previous good character and conduct. If *A.*'s coachman, being in one instance careless or drunk, in driving his master's carriage in his service runs over *B.*, and *B.* sustains an injury, *A.* cannot excuse himself from answering for it because he had taken all imaginable care in selecting him for his servant, or because he had had the best of characters with him from his last employer, or because such misconduct in a long course of years had never happened before. And this is so,

1854. because he is to answer for the act as if it were his own ;
 DANSEY and, if it were his own act, excuses of this kind would
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Coleridge J. My brother *Erle*, at the trial, considered the present case not to fall within this rule. He separated the servant's alleged negligence from the defendant's, and so directed the jury, in such terms, that, unless they thought both concurred (that is, unless the servant were negligent in the act which he did, and the defendant also negligent in keeping the servant), the jury would understand that they ought to find their verdict for the defendant.

After much consideration, I cannot agree to this. It seems to me a novelty in the law, without foundation in any satisfactory principle, complicating the inquiry for the jury very inconveniently, and likely to lead them to unjust conclusions. It will be observed that I have not attempted to lay down any precise definition of the amount or kind of care which the defendant was bound to have taken of the plaintiff's goods: but let the rule be that she was only bound to take such as a prudent householder would take of his own (and less than this it can scarcely be), yet, if you understand and apply that rule in the sense in which my brother *Erle* applied it, it is obvious that it is consistent with the grossest negligence, even misfeasance, on the part of the servant; for a mistress, who uses all ordinary care in the hiring and overlooking of her domestics, may yet have careless or wilful servants, or drunken ones, or she may unfortunately have a servant who is commonly sober, and yet who, upon one occasion, being intoxicated, may occasion great loss or injury to the goods of the guest in the house; and this may happen in the performance of services for the mistress in her place, and for which the

mistress is paid, and yet the mistress will not be answerable. If the rule, so understood, be applicable to the case of negligence or omission, I cannot see, in reason, why it is not equally applicable to misfeasance and commission. The same care may have been taken in the selection of servants guilty of the latter in the grossest degree, as of the former; and if that care be used the master will have done all that, according to the rule, is required of him. But it seems to me, the same answer applies in both; the guest is entitled to the due and reasonable care absolutely; he comes to the house, and pays his money for certain things to be rendered in return, among others the care I speak of; to him it is indifferent whether the master renders them in person or by a servant; it is the master who engages for them; the guest does not stipulate for wholesome food, if the master has a good and careful cook; or a dry bed or clean room, if the housemaid be cleanly and careful; or punctual obedience to his orders, if the domestics are civil and careful. He stipulates for all this directly from the master, having no controul himself over the servants, and having nothing to do with the master's judiciousness, or care, or good fortune, in selecting them. And the duty of the master must be measured by the same rule; he undertakes to the guest, not merely to be careful in the choice of his servants, but absolutely to supply him with certain things, and to take due and reasonable care of his goods.

When indeed we speak of taking the same care of the guest's goods as a prudent owner would take care of his own, we do not speak of a habit or character generally; but we apply it to the particular instance upon which the question arises in judgment. Occasional carelessness

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1854. of conduct is consistent with general carefulness of
 DANSEY character, though it is not commonly found with it.
 v. A man, therefore, may be a prudent owner, and yet not
 RICHARDSON. in every instance take good care of his own property.
 Coleridge J. The only practical question therefore turns upon the
 quality of the individual act. Has such care been shewn
 in the particular instance, as the party injured had a
 right to insist on? If it has not, he must be answerable
 who, expressly or impliedly, has undertaken for a suffi-
 cient consideration to shew it. It may be said that this
 may sometimes lead to hard consequences; and, no
 doubt, the liability of masters for the acts or omission of
 their servants weighs heavily on them; but the hardship
 would be at least equal if the master were not liable;
 and it would be attended with injustice too. If the
 master be morally innocent, so must the injured party
 be also; for he cannot recover, if by his own miscon-
 duct or negligence he has contributed to the loss: and,
 of two innocent persons, surely he should suffer through
 whom it is, by the employment of another, the mischief
 has been occasioned.

I think therefore that the case should go down to a
 new trial.

Lord Lord CAMPBELL C. J. After having considered this
 Campbell C. J. case very deliberately, I come to the conclusion that
 the rule for a new trial ought to be made absolute.

I think that the application for a nonsuit was properly
 refused, and that the defendant was not entitled to a
 verdict on the fourth plea, denying that the plaintiff was
 received into the boarding house, with her goods, on the
 terms mentioned in the declaration. The declaration
 neither alleges a bailment into the personal custody of

the defendant, nor charges an absolute duty to keep safely. The defendant did receive the plaintiff with her goods, on the terms of providing her with rooms, furniture, meat, drink, servants' attendance and other necessities, *and of taking due and reasonable care of her goods while they were in the said house and plaintiff remained such guest therein*; i. e. such due and reasonable care as a boarding house keeper ought to take of the goods of a guest. This by no means amounted to the care which an *innkeeper* is bound to take of the goods of a guest, or the care required of a bailee with whom goods are deposited to be safely kept and returned to the owner; although the duty, whatever the extent of it might be, was not undertaken gratuitously. The evidence adduced by the defendant was very strong to rebut the case of negligence made by the plaintiff, and even to shew negligence on the part of the plaintiff as conducive to the loss; but I cannot bring myself to think that the three questions were properly left to the jury: 1st, "Whether the loss happened from the negligence of the servant in leaving the door open?" 2dly, "If it did, Whether there was any negligence in the defendant in hiring or keeping such a servant?" and, 3dly, "Whether there was negligence on the part of the plaintiff which conduced to the loss?" If the jury should think that there was no negligence in the servant in respect to leaving the door open, they were to find for the defendant. And this was quite proper. But, although there should be negligence in the servant in leaving the door open, however gross it might be, still the jury were to find for the defendant unless there was negligence in the defendant in hiring and keeping such a servant. The third question was to arise only if the two first were answered favorably for the plaintiff.

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1854. Now, if the loss arose from gross negligence in the servant, I cannot say that the defendant might not be liable, although she was not guilty of any negligence in hiring or keeping the servant. Low as the duty of a boarding-house keeper may be, with respect to the care of the goods of a guest, compared to that of an innkeeper, I cannot go so far as to say that in no case can he be liable for loss of goods by the negligence of a servant, although he was not guilty of any negligence in hiring or keeping the servant. I by no means say that, if the loss of the plaintiff's dressing case arose from the servant having by mistake left the door ajar when he intended to shut it, the defendant must be liable for the loss; but I think there may be negligence in a servant in leaving the outer door of a boarding house open, whereby the goods of a guest are stolen, which might render the master liable. I think there is a duty on his part, analogous to that incumbent on every prudent householder, to keep the outer door of the house shut at times when there is a danger that thieves may enter and steal the goods of the guests. If he employs servants to perform this duty, while they are performing it they are acting within the scope of their employment, and he is answerable for their negligence. He is not answerable for the consequences of a felony, or even a wilful trespass, committed by them: but the general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do: and I am not aware how the keeper of a lodging house should be an exception to the rule. He is by no means bound to the same strict care as an innkeeper; but, within the scope of that which he ought to do, I apprehend that he is equally liable whether he is to do it by himself or his servants.

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The doctrine that inquiry is to be made whether the master was guilty of negligence in hiring or keeping the servants is, I believe, quite new. The *scienter*, as to the character and habits of the servants, may become material where an attempt is made to throw upon him a liability for a loss by their felony or wilful trespass, to which *primâ facie* he is not subject. With respect to *commodatum* or "lending gratis," it is expressly laid down by Lord *Holt*, in *Coggs v. Bernard* (a), that the bailee is liable for the negligence of his servant, without any consideration of personal negligence in hiring or keeping him. Putting the case of a horse borrowed, he says: "If the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse." Here extraordinary care is required, and the bailee is liable for slight negligence. But *Story* makes the bailee liable for the negligence of his servant in the case of the hirer of a horse, who is only bound to take the same care of the animal that a prudent man would of his own. "The hirer is not only liable for his own personal default and negligence, but for the default and negligence of his servants, and domestics, about the thing hired. If, therefore, a hired horse is ridden by the servant of the hirer so immoderately, that he is injured or killed thereby, the hirer is personally responsible. So, if the servant of the hirer carelessly and improperly leaves open the stable door of the hirer, and the horse is stolen by thieves, the hirer is responsible therefor." *Story on*

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(a) 2 *Ld. Raym.* 916.

1854. *Bailments*, chap. vi. sect. 400, p. 265 (a). The same distinguished jurist proceeds to shew that in cases where only ordinary care is required in the bailee he is not liable for thefts by his servants, unless there be circumstances which impute to him personally a want of due diligence. "Thus, where a trunk was deposited with an upholsterer for a reward, the contents of which were stolen by his servants, notwithstanding reasonable care in the custody of it by him, he was held not responsible for the loss." But, "if a watch is deposited with a watchmaker for repairs, and it is left in his shop in a less secure repository than that in which he keeps his own, and it is stolen by his servants, he will be responsible for the loss. So, if an agister of cattle for a reward leaves open the gates of his field, or allows the fences to be defective, so that the cattle escape, he is liable for the loss." *Story on Bailments*, chap. vi. sect. 407, p. 269 (b). I conceive that, in all the various sorts of bailment, when a question arises as to the liability of the bailee for the loss of the thing bailed, it is to be determined by the degree of care required from the bailee, and the degree of negligence from which the loss arose; and that the question is not whether the negligence is imputed, personally to the bailee, or, to his servants within the scope of their employment. In the present case, if Mrs. *Richardson*, herself, had gone out and left the door ajar, so that a thief had entered and stolen the plaintiff's goods deposited in the hall, it would not necessarily follow that she would have been liable for the loss. The jury would have had to say whether, under all the circumstances, this was a want of the ordinary care to be expected from a prudent house-keeper. At some hours of the day, and in certain situa-
- (a) 1st edit. P. 404; 5th edit. (b) 1st edit. P. 414; 5th edit.

tions, the outer door of a house may be left entirely open, without any negligence. *Story*, in treating of the extraordinary responsibility of an innkeeper, intimates an opinion that, where it is the usual custom to turn a horse out to pasture in the night, the innkeeper would not be liable for the loss of a horse so turned out and stolen; and he adds: "In the country towns in *America*, it is very common to leave chaises and carriages under open sheds all night at inns; and *also to leave the stable doors open or unlocked*. Under such circumstances, if a horse or chaise should be stolen, it would deserve consideration, how far the innkeeper would be liable." *Story on Bailments*, chap. vi. sect. 478, p. 312 (a).

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The questions to be left to the jury in the present case, I think, were: Whether the door was left open, and whether there was a want of ordinary care and diligence in so leaving it open, whereby the property was lost. The distinction taken, between the negligence of the servant in leaving the door open and the negligence of the defendant in hiring or keeping the servant, it seems to me cannot be supported. Wherever a loss of the thing bailed arises from a want of the degree of care which, from the nature of the bailment, ought to be exercised, I think it immaterial whether the negligence be imputable personally to the bailee, or to servants employed by him.

It was very truly observed, at the bar, that this was not the common case of *depositum*, and that the duty of the defendant was not that of a bailee to whom a chattel is personally delivered to be safely kept and returned, for reward. But there was a duty incumbent upon the defendant, as keeper of the boarding house, with respect to the plaintiff's goods when they were lawfully deposited

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in the hall, and even while they remained in the room appropriated to the plaintiff; and I think it was a breach of that duty if, through the gross negligence of the defendant, *or her servant*, the outer door was left open at a time when thieves might be expected to enter the house, and by means thereof the goods were stolen. The luggage of a passenger by railway, though never delivered to any servant of the company, and remaining in the personal keeping of the passenger during the journey, is nevertheless, in point of law, in the custody of the company so as to render them liable for its loss by the negligence of their servants; see *Great Northern Railway Company v. Shepherd (a)*.

But, in the present case, the jury were told to find for the defendant although the loss arose from the negligence of the servant, although there was no negligence on the part of the plaintiff, if the defendant was not guilty of negligence in hiring or keeping the servant. This amounts to the doctrine that the boarding house keeper cannot be liable for negligence of the servant, however gross, which causes the loss of the goods of the guest, if the master cannot be justly accused of negligence in hiring and employing that servant. To this doctrine I cannot accede. I by no means suppose that a boarding house keeper is liable for the loss of the goods of the guest by theft, where there has been no negligence. Robbery is *vis major*, which according to the better opinion would excuse even an innkeeper, although not a common carrier. But the loss, here, is alleged to have arisen from the gross negligence of the servant, for which I think the boarding house keeper may be liable, without proof of previous knowledge of any deficiency or evil habits in the servant.

(a) 8 Exch. 30.

In the argument, it was contended that the defendant could not be liable for this negligence of the servant, as it resolved itself into mere nonfeasance. But, without determining whether the imperfect shutting of the door is to be called nonfeasance or misfeasance, I think the doctrine cannot be supported that, where there is a duty to be performed which is left to a servant, the master is not liable for the *omission* or *nonfeasance* of the servant. We have already seen the liability of the master where from the omission to shut a stable door a steed is stolen; and many other instances might be given where the omission of a servant to do acts, in pursuance of a duty for protecting the public against damage, would render the master liable for the consequences. Here the duty was that the outer door of the house should be properly attended to; not that it should be kept constantly shut; and the simple fact of its being left for a time ajar or wide open would be no conclusive evidence of negligence for which the defendant is liable. But the outer door might be left open under circumstances which might make it amount to gross negligence: and, if this was the act of the servant, I cannot say that, to render the boarding house keeper liable, it is necessary to prove that he knowingly kept a negligent servant. The only duty in this case arose out of the relation of boarding house keeper and guest; but I think there might have been a breach of that duty under the circumstances alleged and proved, without proof of personal misconduct on the part of the defendant.

I therefore concur with my brother *Coleridge* in thinking that the rule for a new trial should be made absolute. But, as my brother *Wightman* and my brother *Erle* are of a contrary opinion, the rule will not be made absolute.

The Court being equally divided, the rule dropped.

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The QUEEN *against* JOHN THOMAS HUNTLEY,
Clerk.

An order of Sessions, dismissing an appeal against a poor rate, and ordering costs to be paid by the appellant to the respondent, is valid and may be enforced by removing it into this Court, and issuing execution thereon under stat. 12 & 13 Vict. c. 45. s. 18.; for that Act does not take away the jurisdiction given by stat. 17 G. 2. c. 38. s. 4., to order costs on an appeal from a poor rate, but gives an additional remedy for enforcing such an order.

Semble, that in cases in which jurisdiction to order costs on appeal is given only by stat. 12 & 13 Vict. c. 45. s. 5., the order may be enforced under sect. 18. if the order be in other respects valid.

Semble, also, that an order for costs in such a case may be valid, though ordering the costs to be paid to the party and not, as required by stat. 11 & 12 Vict. c. 43. s. 27., to the clerk of the peace. *Sed quare*

MELLOR, in last *Michaelmas* Term, obtained a rule calling on the prosecutors in this case to shew cause why the order of the Quarter Sessions for *The Parts of Lindsey*, made upon the appeal of *John Thomas Huntley*, Clerk, against an assessment for the relief of the poor of the parish of *Binbrooke*, the rule of this Court made to remove the said order of Sessions into this Court, and the writ of *fi. fa.* and subsequent proceedings thereon, should not be set aside, and why the moneys levied thereunder should not be returned to the said defendant. The rule was drawn up on reading (amongst other things) the order of Sessions above mentioned; which, after reciting the reference of the appeal to a barrister, and the making of his award, proceeded: "Now at this Court the respondents brought into Court the award of the said arbitrator; and the said award was, on motion by the said respondents, entered as the judgment of the Quarter Sessions in the said appeal (*a*), and is in the words and figures following; that is to say: 'Whereas,' &c.: the order then set out the award verbatim; which, after reciting the reference, proceeded:

"I do make and publish this my award in writing of and concerning the premises; that is to say: I award and order that the said appeal be, and the same is hereby, dismissed; and that the said assessment be confirmed; and the same is hereby confirmed accordingly. And I award and order that the said appellant shall pay his own costs of the said appeal and of this reference and the costs of this my award; and that he shall, within one month after this my award shall have been entered as the judgment of the said Court of Quarter Sessions in the said appeal, pay to the said respondents their costs of the said appeal and of this reference. And I adjudge and ascertain" &c.: the award then ascertained specifically the different costs (a). This order of Sessions was, by a rule of this Court, removed into this Court in *Trinity* term last, and a *fi. fa.* issued, under which the costs were levied. The present rule was obtained on the ground that, by stat. 11 & 12 *Vict. c. 43. s. 27.*, the order ought to have been to pay the costs to the clerk of the peace, not, as it was, to pay them to the respondents.

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Macaulay, Hayes and Manisty, in last *Michaelmas* Term, shewed cause (b). The rule seems to have been moved for under the supposition that the order for costs was made under stat. 11 & 12 *Vict. c. 43.*: but that is a mistake. That Act is confined to appeals against summary convictions and orders, whereas the present is an appeal against a poor rate. The order for costs is under stat. 17 *G. 2. c. 38.*; and the subsequent proceedings now sought to be set aside are under stat. 12 & 13 *Vict. c. 45.* But the latter statute, in sect. 5,

(a) See *Re Huntley*, 1 *E. & B.* 787.

(b) November 24th; before Lord Campbell C. J., Coleridge, Wightman and Erie Js.

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rather inconveniently, refers to stat. 11 & 12 *Vict. c. 43.*, so as to incorporate part of it; and thus the question comes to be, what is the intention of the Legislature, to be collected from the different parts of the different statutes.

By stat. 17 *G. 2. c. 38. s. 4.* the justices, on appeal against a poor rate, may award costs in the same manner that they are empowered to do in cases of appeal touching settlement by stat. 8 & 9 *W. 3. c. 30. s. 3.* Under these enactments, if unaltered, there would be no question but that this form of order was right; but the remedy for non-payment would be confined to distress (given by the last mentioned Act), or, it may be, to indictment. But by stat. 12 & 13 *Vict. c. 45. s. 18.* it is enacted that "in all cases where any order shall be made by any Court of General or Quarter Sessions of the peace it shall be lawful for the Court of Queen's Bench," or a Judge of that Court, upon proof of refusal or neglect to obey such order, "to order and direct such order of the Court of General or Quarter Sessions to be removed into the said Court of Queen's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner, as a rule made by the said Court of Queen's Bench." If this stood alone, there seems no doubt that the legal construction would be that all orders which could be made before remained good, and that all remedies for enforcing them remained as before, though the Legislature gave a cumulative remedy applicable to all such cases: but no powers would have been given to make orders where they could not be made before. But sect. 5 enacts that, "upon any appeal to any Court of General or Quarter Sessions of the Peace," the Court may, if it think fit, order "the party" against whom the appeal

is decided "to pay to the other party" costs, "such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction" by stat. 11 & 12 *Vict. c. 43*. This section gives another cumulative power; the Sessions may make an order under this statute with the same remedies as those given by stat. 11 & 12 *Vict. c. 43. s. 27.*, that is, by distress or imprisonment; but the powers to make orders already vested in the Sessions by any previous Act are not abrogated. Affirmative words in an Act giving an additional right or remedy do not take away rights or remedies already vested either by previous Acts or at common law. Of this there are many instances; *Rex v. Robinson* (a) may be mentioned. The order made under stat. 17 *G. 2. c. 38. s. 4.* is not the less an order of Sessions within the intention of the Legislature, expressed in stat. 12 & 13 *Vict. c. 45. s. 18.*, because another order might have been made under sect. 5 of this last Act, even on the supposition that an order made under sect. 5 would not be enforceable in this way. In *Regina v. Binney* (b), where the order for costs was on an appeal against an improvement rate made under a local Act, which gave to the party costs on appeal in general terms, *Crompton J.* intimated that in his opinion the order directing the costs to be paid to the party was strictly proper, an opinion which he still retained and acted upon at chambers, on an application made before him in the present case. But, supposing that this order were made under stat. 12 & 13 *Vict. c. 45. s. 5.*, still it would be good, and enforceable under sect. 18. The objection seems to be this. Stat. 11 & 12 *Vict. c. 43.*, which is confined to appeals from summary convictions and orders, by sect. 27 enacts that, "if upon any such

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(a) 2 *Burr.* 799. 803.(b) 1 *E. & B.* 810.

1854. appeal the Court of Quarter Sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay such costs shall not be bound by any recognizance conditioned to pay such costs, such clerk of the peace or his deputy" shall grant a certificate to that effect; and on production of the certificate any justice may direct the costs to be levied by distress, or in default of distress may commit for not more than three months. Now it seems to be said that, inasmuch as stat. 12 & 13 *Vict. c. 45. s. 5.* contains the words "such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction," under stat. 11 & 12 *Vict. c. 43.*, therefore the remedy by distress and imprisonment is the only one for enforcing the present order. But sect. 18 of stat. 12 & 13 *Vict. c. 45.*, which is in terms made applicable to *all cases* of orders by sessions, superadds the remedy by removal into the Queen's Bench. Then it is also said that an order for costs on an appeal, under stat. 11 & 12 *Vict. c. 43.*, must order the costs to be paid to the clerk of the peace, and that therefore the same rule applies to all costs or appeals against orders of sessions, by virtue of stat. 12 & 13 *Vict. c. 45. s. 5.*; and for this *Regina v. Hellicr (a)* was relied on. But that case decided no more than that stat. 9 *G. 4. c. 61. s. 29.* was inconsistent with stat. 11 & 12 *Vict. c. 43.*, and therefore was repealed by sect. 36 of the last mentioned Act. The form of the order is no part of the "manner" in which the costs are recoverable;

(a) 17 *Q. B.* 229.

the words are merely directory, as in the cases referred to in the judgment in *Cole v. Green* (a). And, even if the certificate of the clerk is an essential part of the manner provided by stat. 11 & 12 Vict. c. 43. s. 27., still the order is good, and enforceable under stat. 12 & 13 Vict. c. 45. s. 18.

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Mellor and *Joseph Addison*, in support of the rule. The object of the Legislature in stat. 12 & 13 Vict. c. 45. was, as appears by the recital, "that the law should be more uniform." It would be by no means consistent with this object if there were to be different forms for orders for costs on appeal in different classes of cases, though there is a curious change of language. By sect. 4, an appellant on frivolous grounds is "liable if the Court" of Sessions "shall so think fit, to pay" the costs of the respondent, "such costs to be recoverable in the manner hereinafter directed:" in sect. 5, as already pointed out, the language is that the Court "may order the party to pay to the other party" costs, to be recoverable in the manner provided in stat. 11 & 12 Vict. c. 43.: by sect. 6, if an appeal is not prosecuted, the Court of Sessions "may, if it so think fit," "order to the party receiving" notice of appeal costs "to be paid by the party or parties giving such notice, such costs to be recoverable in the manner last aforesaid." It does not appear why the language is changed; for the three sections evidently mean the same thing: but it cannot be supposed that the Legislature intended that there should be three different forms of order in the three cases, nor that the form of the order for costs under stat. 11 & 12 Vict. c. 43. should be different from that in the

(a) 6 M. & G. 872. 890.

1854. other cases. The true construction seems to be that all three sections, 4, 5 and 6, of stat. 12 & 13 *Vict. c. 45.* incorporate the whole of stat. 11 & 12 *Vict. c. 43.* This gives no more force to the words "in the manner provided" than was given to similar words in *Richardson v. The South Eastern Railway Company (a)*. Then, if sect. 5 does so incorporate stat. 11 & 12 *Vict. c. 43.*, the order is bad for not directing the costs to be paid to the clerk of the peace for the benefit of the party; *Regina v. Hellier (b)*. And the peculiar remedies given by sect. 18 of stat. 12 & 13 *Vict. c. 45.* do not extend to orders for costs under sects. 4, 5 or 6. It would be incongruous, when the remedy given in sect. 5 is distress, and, in default of distress, imprisonment for not more than three months, if, in the same statute, by sect. 18, a remedy was given which would enable the party to take the other in execution at once, absolutely.

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Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*January 30*), delivered the judgment of the Court.

This was a rule for quashing an order of Sessions, and the certiorari by which it was removed into this Court for the purpose of execution, on the ground that the order was void by reason of its ordering the costs of the appeal to be paid by the appellant to the respondent; whereas it was contended that, by stat. 11 & 12 *Vict. c. 43. s. 27.*, and by stat. 12 & 13 *Vict. c. 45. s. 5.*, the order ought to have ordered the costs to be paid to the clerk of the peace; and *Regina v. Hellier (b)* was cited, wherein an order was quashed on this ground.

But it appears to us that the order in question is free from the objection so relied on; for it was made upon

(a) 11 *Com. B.* 154.

(b) 17 *Q. B.* 229.

an appeal against a poor rate; and stat. 17 *G. 2. c. 38. s. 4.* empowers the Sessions, upon such an appeal, to order payment of costs in the form here used; and this statute is now in force, unrepealed and unaltered by any subsequent statute. The order now before us is therefore valid.

Stat. 11 & 12 *Vict. c. 43. s. 27.* relates only to appeals against summary convictions and other orders of justices mentioned in that statute, and does not extend to appeals against poor rates; and *Regina v. Hellier* (a) was an appeal against an order of justices comprised within this statute. By stat. 12 & 13 *Vict. c. 45. s. 5.* the Court of Quarter Sessions, upon all appeals, may order the one party to pay costs to the other party, recoverable in the manner pointed out by stat. 11 & 12 *Vict. c. 43. s. 27.* The words of this section, in their ordinary meaning, would authorize all orders for costs to be made in the form of the order now before us: and, even if the addition making such costs recoverable in the manner pointed out by stat. 11 & 12 *Vict. c. 43. s. 27.* can be thought to require the original order to direct the costs to be paid to the clerk of the peace, still it does not take away any former power of awarding costs, nor alter the form of awarding costs under such former power. It is a cumulative general authority, upon all appeals to give costs; and the better construction seems to be to give to the successful party the right to proceed for the recovery by applying for a distress warrant, and, if need be, a commitment under sect. 5, and also, if need be, by removing the order by certiorari, to take out execution as upon a judgment, under sect. 18.

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(a) 17 *Q. B.* 229.

1854. But the present order is valid under stat. 17 *G.* 2.
 The QUEEN c. 38. s. 4., whatever be the effect of stat. 12 & 13 *Vict.*
 v. c. 45. s. 5. Therefore the present rule must be dis-
 HUNTLEY. charged, and with costs.

Rule discharged with costs.

Tuesday,
 January 17th.

DEAN and Another against HORNBY.

A ship was insured on a time policy, for a year ending 21st April 1852. In December 1851, being on her homeward voyage from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan: in January 1852 she was recaptured by an English war steamer; and a prize

ACTION on a policy of insurance upon the vessel *Eliza Cornish*. The writ issued on 9th December 1852: and the parties, under stat. 15 & 16 *Vict.* c. 76. (The Common Law Procedure Act, 1852) s. 46., desired the opinion of the Court on a case in substance as follows.

The *Eliza Cornish* was insured from the 22d of April 1851 to the 21st April 1852, both days included. The case set out the policy, whereby the plaintiffs effected the insurance on the ship, valued at 1800*l.*; and among the perils insured against were "pirates" and "takings". The vessel was sent home by the recaptors from Valparaiso, under the command of a prize master, with instructions to proceed to Liverpool, and obtain an adjudication in the Court of Admiralty. She met with bad weather, and put into *Fayal* on 19th August 1852, where she was sold by the prize master, being then in a state not justifying the sale. In December 1852, the owners commenced an action against the underwriters, claiming for a total loss. Held: that they were entitled to recover as for a total loss, there having been a total loss by the piratical seizure, in the first instance, and the owners not having afterwards, up to the time of the commencement of the action, had either actual possession or the means of obtaining it: and it being immaterial whether there was or was not a right of detainer against the owners.

That the notice of abandonment was early enough, being given in reasonable time after the receipt of the intelligence of the loss.

That the inaccurate statement of the vessel having been condemned as a prize at Valparaiso did not vitiate the notice.

at sea." The policy was duly underwritten by the defendant and fifteen other underwriters.

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On 7th *November* 1851, the *Eliza Cornish* set sail on her homeward voyage from *Valparaiso to Liverpool*, with a cargo and crew consisting of the master and six hands. On 1st *December* 1851, she put into *Punta Arenas*, in the *Straits of Magellan*, to repair some slight sea damage she had received. On the same day she was boarded by an armed force from the shore, who took forcible possession of her, and placed the master and crew under restraint, and conveyed them as prisoners ashore. The persons who committed this outrage were *Chilians*, acting under the orders of one Lieutenant *Cambiaso*. The *Chilian* Government had a penal settlement at *Punta Arenas*, which had been placed under the charge of a governor, named *Munioz*, of a captain *Salas*, and others, among whom was Lieutenant *Cambiaso*, and a few soldiers. Shortly after the arrival of the *Eliza Cornish*, there was a mutiny and insurrection at the settlement. *Cambiaso* and some of the soldiers conspired with some of the convicts against *Munioz*. *Munioz* was shot by them, the soldiers overpowered; and *Cambiaso* assumed the command. Nothing was known of these events by those on board the *Eliza Cornish* when she put into *Punta Arenas* as aforesaid, as a friendly port. Having taken possession of the said vessel as aforesaid, the insurgents under the command of *Cambiaso* shot the master, and kept the crew in confinement. The insurgents threw overboard all the upper part of the cargo, consisting of guano, cocoa and bark, and plundered her of treasure amounting to about 20,000*l.* sterling. The mate of the vessel remained in confinement until 13th *December* 1851; when, fearing

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that he would be shot if he refused, he agreed to navigate the vessel to *Aranco*; and he and the remainder of the crew prepared the vessel for sea again, working under a guard of soldiers, and being placed in confinement on shore at night.

On the 31st *December*, from 180 to 200 persons were placed on board, with cannon and other arms, and a piratical flag. On the 2d *January* 1852, the vessel got under weigh, in company with the *Florida*, an *American* vessel, which *Cambiaso's* party had also seized; *Cambiaso* taking command of the *Florida*, and his second in command, named *Briones*, took command of the *Eliza Cornish*. *Briones* and his men exercised themselves with arms, and occasionally hoisted the piratical flag.

On 28th *January* 1852, before the *Eliza Cornish* got clear of the *Straits of Magellan*, she was rescued by Her Majesty's steam ship *Virago*; which vessel had been sent from *Valparaiso* for the purpose, at the request of the *Chilian* Government: and most of the treasure, which was found on the persons of the insurgents who were on board the *Eliza Cornish* and the *Florida*, was recovered and reshipped on board the *Eliza Cornish*. The commander of the *Virago* took possession of the *Eliza Cornish*, and put two officers and some men in charge of her, with directions to take her to *Valparaiso*. She arrived at *Valparaiso* on the 23d *February*, 1852, where she remained in the custody and possession of the officer of the *Virago*.

On 10th *March* 1852, she again left *Valparaiso* for *Liverpool*, with the remainder of her cargo, in charge of one *Charles Bowden*, one of the commissioned officers of Her Majesty's ship *Dædalus*, with two other officers

and eight seamen belonging to the *Virago* and *Dædalus*. These officers and men were placed in charge of her by the commander of the *Virago*, who sent her to *England*, with instructions to have the matter adjudicated upon by the Court of Admiralty. The mate and four of the crew of the *Eliza Cornish* also remained on board. The *Eliza Cornish* had received no damage, and sailed from *Valparaiso* with much the largest part of her cargo, which was very valuable. The vessel, on her homeward voyage, met with bad weather, and bore up for *Monte Video*, to repair sea damage on 14th *April* 1852. She arrived there on 24th *April* 1852. She sailed again, after being repaired, on 25th *June* 1852; and, having again met with bad weather, and suffered damage, she was obliged to put into *Fayal*, where she arrived on 19th *August* 1852. On 21st *August* 1852, she was surveyed; two subsequent surveys were held upon her; when the surveyors recommended that she should be sold as unfit for repairs: and she was afterwards sold by the said *Charles Bowden*; and the proceeds of the sale were received by him. From the time she last left *Valparaiso* until the time of her sale at *Fayal*, she was in the possession and under the controul of the said *Charles Bowden*, under the circumstances before mentioned. She was repaired by the purchaser at a trifling expence, and has since arrived in *England*; and therefore Mr. *Bowden* was not justified in selling her.

In the early part of 1853, after it was discovered that the *Eliza Cornish* (her name having been changed to the *Segredo*) had arrived in *England*, proceedings were taken against her in the Admiralty Court by the plaintiffs and defendant in concert; which proceedings, by previous agreement between them, were to be without

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prejudice to either of the said parties as to their legal rights under the circumstances above set forth, as if such proceedings had not been taken. And, the Court of Admiralty having decreed the possession to the owners, she has been sold, with the consent of the plaintiffs and defendant, and the money deposited to await the result of this case. The plaintiffs received intelligence of the seizure of the vessel at *Punta Arenas*, of her capture by the *Virago*, and of her having been taken to *Valparaiso* in charge of a prize crew, at the same time, viz. about the end of *April* 1852. And, on the 30th of that month, they addressed to the defendant and the other underwriters the following notice of abandonment.

“ *Liverpool* 30th *April*, 1852.

“ Messrs. *Headlam & Langton, Liverpool*.

“ Gentlemen,

“ Having been informed by Mr. *Myers*, of the firm of *W. J. Myers & Co.*, that intelligence has arrived of the condemnation at *Valparaiso* of the brigantine *Eliza Cornish*, as a prize to her Majesty's steamer *Virago*, we will thank you to inform the underwriters on our policy on that vessel, effected through you for 800*L*, on the 14th *May* 1851, that we abandon to them and the other underwriters in that vessel at *Lloyd's, London*, our interest therein, and claim a total loss on our policies. And will thank you to send us in a credit note for the amount as customary.

“ We remain, &c.

“ *Dean & Mills.*”

To which they received the following reply.

“ Gentlemen,

“ We have received your favour of yesterday, tendering

abandonment to the underwriters of the *Eliza*, as far as regards a policy for 800*L.*, of 14th *May* 1851; and we are instructed by them to decline accepting of the same for the present.

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"Yours truly,
"Headlam & Langton."

Neither the mate nor the crew of the *Eliza Cornish*, or any one else on the plaintiffs' behalf, ever had possession of or controul over the said vessel after she was first taken possession of on 1st *December* 1851, at *Punta Arenas*, by the *Chilian* insurgents.

The Court is to be at liberty to draw any conclusion of fact which a jury might draw. And, in case the Court should be of opinion that an average loss only has been incurred, the amount is to be settled out of Court by an average adjuster agreed upon between the parties. And the opinion of the Court is desired, "Whether the plaintiffs are entitled to be paid by the defendant as for a total or for an average loss for the said vessel, under the said policy."

J. P. Wilde, for the plaintiffs. This is a case of loss by pirates. On 1st *December* 1851 the vessel was in the hands of a piratical force; and nothing that has since occurred has altered that state of things, so far as regards the relation of the assured to the assurer. It is true that, when the owner recovers the vessel before action brought, he cannot recover as for a total loss: not that, even then, the loss has not been total, but because, the contract of insurance being simply for indemnity, the owner, having ultimately not been damaged, cannot recover. But here the owner did not recover possession at all up to the time of the

1854. commencement of the action: whether the vessel was wrongfully detained or not is immaterial. In *Holdsworth v. Wise* (a) a ship was deserted by the crew, being in a leaky state; and the owners gave notice of abandonment: it afterwards turned out that, before the notice was given, the crew of another vessel had taken possession of her, and that she had been repaired, the expence of salvage and repairs equalling or exceeding her value: and it was held that the owners, having given the notice before they heard of her safety, were entitled to recover for a total loss. *Parry v. Aberdeen* (b) and *M'Iver v. Henderson* (c) are authorities to the same effect. In *Thornely v. Hebson* (d), which may be relied upon as an authority the other way, there never was a total loss: the owners were never dispossessed of the vessel. What has taken place since the commencement of the action is immaterial. [*Cowling*, for the defendant, admitted this.] The parties now holding the vessel have a claim for salvage, and therefore a lien under which the vessel may be detained; *Hartfort v. Jones* (e). [Lord Campbell C. J. That seems not essential to your case: the illegality of the detainer would not prevent the loss from remaining total, any more than the illegality of the act of the pirates prevented this from being a total loss in the first instance.]

Cowling, contra. There was no total loss at the time of the abandonment: and the notice of abandonment was given under a mistake either of facts or of law. Before that notice, the vessel had been taken possession

(a) 7 B. & C. 794.

(b) 9 B. & C. 411.

(c) 4 M. & S. 576.

(d) 2 B. & Ald. 513.

(e) 1 Ld. Raym. 393.

of by the *Virago*: after that, there was no loss. The notice appears to rely on the "condemnation at *Val-paraiso*" "as a prize to Her Majesty's steamer *Virago*." But no such condemnation could be legal. Had the notice been given while the vessel was in the hands of the pirates, there would at that time have been a total loss, for which the plaintiffs might have recovered, subject to such events as might occur before the action brought. But, upon the recapture, the property was in the owners: the possession was indeed in the Queen, but not a beneficial possession. She, by her servants, held the vessel for the purpose of doing justice to the parties really interested; *Case of Piracy (a)*. There may be a lien for the eighth of the value of the ship given to the recaptors by stat. 13 & 14 *Vict. c. 26. s. 5*. That, however, cannot support the notice of abandonment as for a total loss: it cannot have the effect of imposing upon the underwriters the character of ship-owners. The owner is entitled to all the freight, on the arrival of the vessel with the cargo at the port of delivery; *Abbott on Shipping*, 406 (8th ed.). In *Thellusson v. Shedden (b)* Sir James Mansfield, delivering the judgment of the Court, said: "It is true that a capture simply proved establishes a total loss; but where the plaintiff in the same breath proves a recapture, there is an end of the capture and total loss, and the plaintiff is entitled to a partial loss only." The same doctrine is assumed in the judgment of the Court in *Roux v. Salvador (c)*. In *Knight v. Faith (d)* this Court,

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(a) 12 *Rep.* 73.(b) 2 *New R.* 228. 230.(c) 3 *New Ca.* 266. 286. in *Exch. Ch.*; reversing the judgment of C. P. in *Roux v. Salvador*, 1 *New Ca.* 526.(d) 15 *Q. B.* 649. 661.

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quoting from the case last cited, states the test of the right to abandon to be "if a prudent man not insured, would decline any further expence in prosecuting an adventure, the termination of which will probably never be successfully accomplished." [Lord Campbell C. J. Do you say that the mere legal right to recover possession, without the immediate means of obtaining it, does away with a total loss? Where it is reasonably certain that the owner will regain possession, so that in effect his possession is only retarded, there cannot be an absolute total loss. If the master, under these circumstances, had sold the vessel, the sale would have been illegal: the parties who here sold had no more authority than the master; and the sale has the same effect as a sale by him: this was the view taken in the Admiralty Court by Dr. Lushington in the case of this ship. [Lord Campbell C. J. Can you say that the vessel has arrived in *England* in pursuance of her voyage? She has merely traversed the same track on the ocean? At the least, she has come to *England* for the purpose of adjudication by the Admiralty Court: that, under the circumstance, was the regular and proper course. *Bainbridge v. Nelson (a)* was much like this case. A vessel having been captured, the owners abandoned her: she had at that time been recaptured; but the owners did not learn this till after they had given the notice; and they persisted in the notice, though the vessel was restored to them without damage: it was held that they could not treat this as a total loss. [Lord Campbell C. J. Is not the rule this: that, to get rid of the total loss, the vessel must be in esse and the owner have the means

of obtaining possession?] That rule seems too narrow: when a vessel is at sea the owner cannot take actual possession; surely in such a case it must be enough that the vessel is known to be under such circumstances that the party in possession holds for the owner. In *Holdsworth v. Wise* (a) and *Parry v. Aberdeen* (b) the events which happened after the first loss did not create a state of things beneficial to the owners: that distinguishes those authorities from a case like the present, where the owners are entitled to have the vessel on paying one eighth for salvage. There is, further, a question whether the notice of abandonment was not too late. [The Court intimated their opinion that the notice was given in reasonable time after the intelligence of the loss arrived.]

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J. P. Wilde, in reply. The authorities cited against the plaintiffs will be found to be only cases in which the abandonment became ineffectual by reason of something brought to the knowledge of the owner before action brought. The question here is whether, when the action was brought, the vessel was actually or virtually restored to the possession of the plaintiffs, or was out of their possession only from their own fault. *Holdsworth v. Wise* (a) is therefore applicable. The voyage contemplated has not been performed: the ship has arrived in *England*, but not in pursuance of the proposed voyage: she has been brought hither to be subjected to the inquiry in the Court of Admiralty. The loss of a voyage does not indeed, according to the most

(a) 7 B. & C. 794.

(b) 9 B. & C. 411.

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recent decisions, produce a total loss (a): but here the total loss occurs from other causes, and is not cured by that which is not a completion of the voyage. The plaintiffs need not rely on the lien: the vessel not having been restored, it is immaterial whether it is legally or illegally detained. Even if the question of lien were material, it would not be necessary to consider the effect of stat. 13 & 14 *Vict. c. 26. s. 5.*: before that statute, salvage might be earned by the sailors of a ship belonging to the Royal Navy; *The Lustre. Finlay (b)*.

Lord CAMPBELL C. J. I am of opinion that, according to *English* law, the plaintiffs, in conformity with decided cases, are entitled to judgment. The underwriters undertake for the safety of the ship from *April* 1851 to *April* 1852. In *December* 1851 she is taken by pirates. Then, in fact, a total loss has occurred. After that, she never is restored to the owners; nor have they had an opportunity of regaining possession. They have lost the possession by events over which they have no controul, and therefore are entitled to the indemnity for which they have paid. The cases referred to establish this principle: that, if once there has been a total loss by capture, that is construed to be a permanent total loss unless something afterwards occurs by which the assured either has the possession restored, or has the means of obtaining such restoration. The right to obtain it is nothing: if that were enough to prevent a total loss, there never would in this case have been a total loss at all; for pirates are the enemies of mankind, and have

(a) See *Doyle v. Dallas*, 1 Moo. & Rob. 48. 55.

(b) 3 Hag. Ad. R. 154.

no right to the possession. The question therefore is, Had the owners ever, after the capture, the possession or the means of obtaining possession? That principle is to be found in *Holdsworth v. Wise* (a), *Parry v. Aberdeen* (b) and *M'Iver v. Henderson* (c). In *Bainbridge v. Neilson* (d), which is a case relied upon by Mr. Cowling, the property was actually restored before the action was brought. In *Thornely v. Hebson* (e) the owners, before they brought the action, had the means of obtaining possession. In both cases the principle is acknowledged. At what time, in the present case, did there cease to be a total loss? When had the assured either the possession or the means of obtaining it? Whether the detainer was rightful or wrongful is immaterial: for the possession was taken away by the plaintiffs and never restored to them. The notice of abandonment was abundantly early, having been given in quite reasonable time after the receipt of the intelligence of the loss; for the statement of the case upon this point is, that the plaintiff, about the end of *April* 1852, received at one time the intelligence of the seizure by the pirates, of the recapture, and of the arrival at *Valparaiso*; and notice of abandonment was given on the 30th of the same *April*. The fact that the policy of insurance expired on the 21st of that *April* would only prevent the underwriters from being liable for any event occurring after that day. It is true that the notice speaks of a "condemnation" at *Valparaiso*; and that is inaccurate: but we must suppose that the notice proceeded on these

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(a) 7 B. & C. 794.

(b) 9 B. & C. 411.

(c) 4 M. & S. 576.

(d) 10 East, 329.

(e) 2 B. & Ald. 513.

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facts. Under these circumstances, I am of opinion that the plaintiffs were entitled to abandon.

COLERIDGE J. I am of the same opinion. There was a capture by pirates; and, if that were all, there would unquestionably be a total loss. The question, therefore, is as to what has occurred since. The vessel is recaptured by an *English* man of war; a prize master is put on board: and she is brought back to *England*, not on her original voyage, but with a view to proceedings in the Court of Admiralty. She receives damage, and is ordered to be sold. These are all the facts that are material; for we have nothing to do with what occurred in the Admiralty Court: nor is the question of the right to the possession material: that right was never out of the plaintiffs. But the material question is, Whether the possession was ever restored to the plaintiffs; and it never was, from the first to the last. As to the notice of abandonment, I agree with my Lord that it is enough if this is given in reasonable time, and that the time here was reasonable.

WIGHTMAN J. The question here is, Whether that which was at one time a total loss has been converted into a partial one. To make that so, the circumstances ought to be such as either to restore the possession to the assured, or to afford them the means of obtaining possession. Here there never was a restoration in fact, nor the means of regaining possession: what was done after the capture by the pirates was the act of the recaptor: the vessel remained out of the controul of the assured; the recaptor brought her to another port,

where she was sold; and she was then brought to *England*. The assured, therefore, never had an opportunity of taking possession; and there never ceased to be a total loss. The case is not unlike *Cologan v. London Assurance Company (a)*.

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(CROMPTON J. was absent.)

Judgment for plaintiffs, for total loss.

(a) 5 M. & S. 447.

JORDAN *against* WILCOXON.

Thursday,
January 19th.

HONYMAN moved for a rule Nisi to set aside an order made by *Parke B.*, at Chambers, under stat. 9 & 10 *Vict. c. 95. s. 58.*, and stat. 13 & 14 *Vict. c. 61. s. 22.*, prohibiting all further proceedings in a plaint depending between the parties in the County Court of *Lancashire* held at *Liverpool*, for want of jurisdiction. He stated that the order was made on 22d *June* 1853, so that a whole term had elapsed: but he suggested that the case of prohibition might be looked upon as an exception to the ordinary rule: and he referred to *De Haber v. Queen of Portugal (a)*, where it was held by this Court that a prohibition for want of jurisdiction might be awarded at the instance of a stranger, on the ground that it was a contempt of the Crown for the inferior Court to proceed without juris-

The rule that an application to set aside a Judge's order cannot be made after the end of the term next following the making of the order applies to an order made by a Judge at Chambers, prohibiting a County Court from proceeding, under stats. 9 & 10 *Vict. c. 95. s. 58.*, and 13 & 14 *Vict. c. 61. s. 22.*

(a) 17 Q. B. 171.

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diction: and he contended that in like manner the closing the inferior Court to a party entitled to sue therein, which was an obstruction of public justice, was also not within the strict rules applicable to proceedings affecting only the parties themselves. [Lord Campbell C. J. We have laid it down that an application to set aside a Judge's order cannot be made later than the term next succeeding the order.] Even after a writ has issued, the Court will award a consultation if it appears that there is jurisdiction. [Lord Campbell C. J. I think the objection as to time applies in this case as much as in that of the order.]

Per CURIAM (a).

Rule refused.

(a) Lord Campbell C. J., Coleridge, Wightman and Erle Js.

Thursday,
 January 19th.

DEWHURST, WATSON and WHITTLE, Trustees of
 the ORIGINAL UNION Friendly Burial Society,
 against CLARKSON.

Where an
 amendment
 of the rules
 of a Friendly
 Society has

THE declaration alleged that plaintiffs, *Trustees of The Original Union Burial Society* (the rules of which received the barrister's certificate, under stat. 4 & 5 W. 4. c. 40. s. 4., such amendment is valid, though there has been no resolution of the Society in compliance with the enactments of stat. 10 G. 4. c. 56. s. 9., or with the rules of the Society incorporating that section. Per Lord Campbell, Coleridge and Wightman Js.: dissentiente Erle J.

The rules of a Society directed that three trustees should be appointed, of whom one should be treasurer, in whose names the funds of the Society should be invested: and that the treasurer should invest the unappropriated stock exceeding 50*l.* as the board of management should direct, pursuant to stat. 13 & 14 Vict. c. 115. Three trustees were elected; but a fourth person was elected treasurer. Held that the three trustees could not sue a former treasurer for the balance in his hands, under these rules: and that they had no title to do so under stat. 10 G. 4. c. 56. or stat. 13 & 14 Vict. c. 115., which were prior to the rules taking effect.

which Society have been duly certified by the Registrar of Friendly Societies in *England*), sued defendant for money payable by defendant to plaintiffs, as trustees of the said Society, for money lent by the Society to defendant, money received by defendant for the use of the Society, interest upon money due from defendant to the Society, and money due from defendant to the Society on accounts stated between them.

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Pleas. 1. Never indebted. Issue thereon.

2. That plaintiffs are not, nor were, trustees of the Society, as alleged. Issue thereon.

3. That the rules of the Society have not been duly certified by the Registrar of Friendly Societies in *England*, as alleged. Issue thereon.

4. raised an issue not material to the questions decided in banc.

5. That defendant is the treasurer of the Society, and that he became so indebted as in the declaration mentioned in the course of his office and due discharge of his duties as such treasurer; and that he holds and retains the money in the declaration mentioned as such treasurer, and for the use of the said Society, according to the duties of his office as such treasurer, and by the authority and according to the decree and directions of the said Society and a majority of the members thereof. The plaintiffs took issue.

6. That, by one of the rules of the Society, duly certified and enrolled before the passing of an Act &c. (9 & 10 *Vict. c. 27.*, "To amend the laws relating to Friendly Societies"), it is declared that there shall be a trustee or treasurer appointed, who may or may not be a member of the said Society, by a majority of the sub-

1854. scribes present at any general or quarterly meeting of the Society, in whose name the funds of the Society shall be invested; and such treasurer shall continue in office for life, unless he either voluntarily resigns the office, or is guilty of a breach of the trust reposed in him, or becomes bankrupt or insolvent, to be proved to the satisfaction of a majority of the subscribers present at any quarterly or general meeting; in either case he shall be dismissed from his office of treasurer: and that there is no other provision in the said rules for the appointment of any trustees: and that defendant was, before the commencement of this suit, duly appointed such treasurer or trustee as aforesaid by a majority of the subscribers present at a general or quarterly meeting of the Society according to the said rule; and that he hath never resigned the said office, or been proved to be, or been, guilty of a breach of the trust reposed in him, or been proved to have become, or become, bankrupt or insolvent; nor hath he ever been dismissed from his office of treasurer, but hath, from the time of his said appointment hitherto, continued to act as such treasurer. The plaintiffs took issue.

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7. raised an issue not material to the questions decided in banc.

On the trial, before *Erle J.*, at the last *Lancaster Assizes*, it appeared that the Society mentioned in the pleadings had been established as early as 1825, and had, till 1853, been governed by a set of rules duly made, certified, confirmed &c., and several times amended, the last certificate as to such amended rules being as follows:

“I hereby certify that the foregoing rules are in conformity to law, and with the provisions of the Act

10 *Geo. 4, c. 56*, as amended by 4 and 5 *William 4, c. 40*.

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John Tidd Pratt, the Barrister at Law appointed to certify Rules of Saving Banks.

"*London, 28th January, 1846.*

"Copy sent to the Clerk of the Peace for *Lancashire*,
"*J. Tidd Pratt.*"

On 10th *November* 1845, the Secretary of the Society had made, in respect of these last amendments, the affidavit prescribed by stat. 4 & 5 *W. 4. c. 40. s. 4.*, "that, in making the alterations and amendments to the rules of the said Society, the provisions of the Act under which the rules of the said Society are enrolled have been duly complied with;" and transcripts of these amendments, duly signed and countersigned, had been submitted to the barrister previously to his making the above certificate.

These rules, so amended, constituted what, in the discussions in Court, were called the old rules of the Society. Of these, the rules material to the present decision were the following.

12. "There shall be a trustee or treasurer appointed, who may or may not be a member of the Society, by a majority of the subscribers present at any general or quarterly meeting of the Society, in whose name the funds of the Society shall be invested; and such treasurer shall continue in office for life, unless he either voluntarily resigns the office, or is guilty of a breach of the trust reposed in him, or becomes bankrupt or insolvent, to be proved to the satisfaction of a majority of the subscribers present at any quarterly or general meeting,

1854. in either case he shall be dismissed from the office of
DEWHURST treasurer; and if a vacancy occurs by any of the means
v. above mentioned, the secretary shall give notice at the
CLARKSON. next general or quarterly meeting, and at such meeting
a succeeding or new treasurer shall be appointed by a
majority of the subscribers then present; and whenever
it shall be required by a majority of the subscribers
present at any duly convened meeting of the Society;"
&c.

26. "No new rules, or alterations of these rules, shall be made, unless at a general meeting of the subscribers of this Society, convened by public notice, written or printed, signed by the secretary or president, or other principal officers of this Society, in pursuance of a requisition for that purpose, by seven or more of the subscribers of this Society, according to 10 Geo. 4, c. 56, sec. 9 (a), which said requisition and notice shall be publicly read at the two usual meetings of this Society, to be held next, before such general meeting, for the purpose of such alterations and repeal, unless a committee of such subscribers shall have been nominated for that purpose, at a general meeting of the subscribers of this Society, convened in the manner aforesaid; in which case, such committee shall have the like power to make such alterations or repeal; and unless such alterations or repeal shall be made with the concurrence and approbation of three fourths of the subscribers of

(a) Which enacts "that no rule confirmed by the justices of the peace in manner aforesaid shall be altered, rescinded, or repealed, unless at a general meeting of the members of such Society" &c., as in the rule in the text throughout, except that the "members" are named instead of "subscribers," and "such Society" instead of "this Society," with one or two verbal differences.

this Society, then and there present, or the like proportion of such committee as aforesaid, if any shall have been nominated for that purpose."

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Under these rules, the defendant was appointed treasurer; and nothing had occurred to put an end to his tenure of such office unless the circumstances after mentioned had that effect.

In 1853, a set of new rules was transmitted to the barrister, with the following affidavit, made 17th *February* 1853.

"I, *George Halton*, of *Preston*, the secretary of the select committee appointed to revise the rules of the *Preston Original Union Friendly Burial Society*, held at" &c., "make oath and say, that, in making the alterations and amendments to the rules of the said Society, the provisions of the Act under which the rules of the said Society are enrolled have been duly complied with."

There were also annexed to the affidavit the signatures of eight persons who designated themselves as "the committee appointed to revise the rules." And the names of the president and secretary, and three others, members of the Society, were signed at the foot of the new rules.

Mr. *Pratt* made the certificate following.

"I hereby certify that these alterations of rules are in conformity to law, and to the provisions of the statutes in force relating to Friendly Societies.

"*John Tidd Pratt*,

"The Registrar of Friendly Societies in *England*,

"8th *March*, 1853."

These new rules were allowed and confirmed at sessions, and there enrolled. But it appeared that they

1854. had been drawn up and transmitted without any such
DEWHURST meeting having been held as is prescribed by sect. 26
v. of the old rules and stat. 10 *G. 4. c. 56. s. 9.*
CLARKSON.

Of the new rules, those material to the points decided were the following.

12. "That there shall be three trustees appointed, one of whom shall be treasurer, who may or may not be members of the Society; they shall be appointed by a majority of subscribers present at any general or quarterly meeting of the Society, in whose names the funds of the Society shall be invested; and such trustees and treasurer shall continue in office during pleasure, unless they voluntarily resign their office, be guilty of a breach of the trust reposed in them, or become bankrupt, or insolvent, to be proved to the satisfaction of a majority of the members then present at any quarterly or general meeting; in any of these cases they shall be dismissed from the office of trustee or treasurer; and if a vacancy occurs by any of the means above mentioned, the secretary shall give notice at the next general or quarterly meeting, and at such meeting, a succeeding new trustee or treasurer shall be appointed by a majority then present. And whenever the unappropriated stock shall amount to above 50*L.*, the same shall be invested by the treasurer, as a majority of the board of management shall direct, and pursuant to 13 and 14, *vic.*, c. 115; and immediately after the investment of any money, the treasurer shall at the following meeting report the transaction to the Society, through the medium of the secretary, when the same shall be entered in the Society's books; and with a view to meet the just claims of the Society, a majority of the board of management may direct the treasurer to call in such part of the Society's

money as may be necessary for that purpose. The treasurer shall give security pursuant to 10 GEO. 4, c. 56, s. 11."

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After the enrolment of the new rules, the three plaintiffs were elected trustees, according to the regulations therein prescribed, except that no one of them was treasurer; but another person, named *Thomas Grune*, was elected treasurer.

It was admitted, on the part of the defendant, that he had received the money claimed, on behalf of the Society: but it was contended for him that he continued treasurer, and that the plaintiffs were not legally appointed trustees. For the plaintiffs, it was admitted that the action must fail unless the plaintiffs could establish their title under the new rules: and it was further admitted that the new rules had not been made in conformity with the 26th of the old rules: but it was contended that the Registrar's certificate was conclusive as to the validity of the new rules, and that it was not open to object that they were not regularly adopted in the manner prescribed in the old rules. The learned Judge was of opinion that the certificate was not conclusive; and he directed a verdict for the defendant: but it was afterwards arranged that the plaintiffs should be nonsuited, with leave reserved to enter a verdict for them. For the defendant it was further objected (a) that the plaintiffs were not entitled to sue, even supposing the new rules valid, inasmuch as the 12th of those rules directed that one of the three trustees should be treasurer, and none of the rules vested the money in a trustee not being treasurer. It was agreed that the defendant should be allowed to raise this point upon shewing cause against the rule to be moved for.

(a) Some other points were taken for the defendant, which, in the result, became immaterial.

1854. In *Michaelmas* Term, 1853, *Atherton* obtained a rule
DEWHURST for setting aside the nonsuit and entering a verdict for
v. plaintiffs. In this term (a),
CLARKSON.

Watson and *Rew* shewed cause. First, as to the validity of the new rules. By stat. 10 G. 4. c. 56. s. 2. Friendly Societies have power to make rules, "and also from time to time to alter and amend such rules as occasion shall require, or to annul and repeal the same, and to make new rules in lieu thereof, *under such restrictions as are in this Act contained.*" Sect. 4 enacts that a transcript "of all *such* rules, signed by three members, and countersigned by the clerk or secretary, with all convenient speed after the same shall be made, altered, or amended, and so from time to time after every making, altering, or amending thereof, shall be submitted, in *England* and *Wales* and *Berwick upon Tweed*, to the barrister at law for the time being appointed to certify the rules of Saving Banks," "for the purpose of ascertaining whether the said rules of such Society, or alteration or amendment thereof, are in conformity to law and to the provisions of this Act; and that the said barrister" "shall give a certificate thereof, or point out in what part or parts they are repugnant thereto:" and the transcript, when certified, is to be deposited with the clerk of the peace and laid before the next quarter sessions (or adjournment thereof), and be there allowed and confirmed, and be filed by the clerk of the peace with the rolls of the sessions; and the clerk of the peace is to sign a certificate of the enrolment on a duplicate copy to be returned to the Society. By sect. 7, new rules, or

(a) January 12th. Before Lord Campbell C. J., Coleridge, Wightman and Erie Js.

alterations and amendments of former rules, or orders annulling or repealing former rules wholly or partially, are not to be in force till entered in the Society's book, "and certified, when necessary, by such barrister," and until the transcript shall have been deposited with the clerk of the peace who shall file and certify: and "no such rule, or alteration in or amendment of any former rule; shall be binding or have any force or effect until the same shall have been confirmed by such justices, and filed as aforesaid." Sect. 8 makes all rules, made and in force, and duly entered in the book, and confirmed, binding; and the copy of the transcript is to be evidence of the rules. The confirmation, therefore, has under this statute no effect except upon rules or alterations properly made: and the transcript proves only the fact of the rules, not their validity. Then the validity depends upon the enactments as to making the rules or amendments: and sect. 9 enacts "that no rule confirmed by the justices of the peace in manner aforesaid shall be altered, rescinded, or repealed, unless at a general meeting of the members of such Society as aforesaid, convened by public notice" &c. The amendments now in question were, as is admitted on the other side, not made in conformity with this enactment. Therefore, under stat. 10 *G.* 4. c. 56., these new rules, though confirmed at sessions, would be invalid: and the barrister's certificate, under sect. 4, could not give validity to rules otherwise invalid: he had no power to inquire into the circumstances under which the alterations were made: he could only ascertain that the rules, on their face, did not violate the Act. Then stat. 4 & 5 *W.* 4. c. 40., by sect. 3, repeals so much of stat. 10 *G.* 4. c. 56. as relates to the rules being transmitted to the barrister,

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1854. and deposited with and certified by the clerk of the peace, and to the rules or amendments not being binding till confirmed at sessions and filed; and, by sect. 4, substitutes fresh regulations. By these, two transcripts, signed by three members and countersigned by the clerk or secretary, with an affidavit, in the case of an alteration or amendment, by the clerk or secretary, that the provisions of stat. 10 *G. 4. c. 56.*, or of the Act under which the rules have been enrolled, have been duly complied with, are to be submitted to the barrister, "for the purpose of ascertaining whether the said rules of such Society, or alteration or amendment thereof, are calculated to carry into effect the intention of the parties framing such rules, alterations, or amendments, and are in conformity to law and to the provisions of" stat. 10 *G. 4. c. 56.* "or this Act;" and the barrister "shall advise with the said clerk or secretary, if required, and shall give a certificate on each of the said transcripts, that the same are in conformity to law and to the provisions" &c., "or point out in what part or parts the said rules are repugnant thereto;" and one of the transcripts, when certified, is to be returned to the Society, and the other is to be transmitted by the barrister to the clerk of the peace, and by him laid before the next quarter sessions (or adjournment); "and the justices then and there present are hereby authorized and required, without motion, to allow and confirm the same; and such transcript shall be filed by such clerk of the peace with the rolls of the sessions;" "and that all rules, alterations and amendments thereof, from the time when the same shall be certified by the said barrister," "shall be binding on the several members and officers of the said Society, and all other persons having

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interest therein." Now these provisions give no additional effect to the barrister's certificate, as making valid rules not legally made. The barrister has no power to inquire into the truth of the affidavit transmitted to him. The certificate merely fixes the time at which rules come into effect which have been properly made. The Legislature, when it is intended that the proceeding by any functionaries shall, of itself, be conclusive, use precise language; as in sects. 14, 27 and 29 of stat. 10 *G. 4. c. 56*. No reason can be suggested for giving such effect to the barrister's certificate. It may perhaps be said that the object was to prevent the intention of the parties failing by mere mistake: but that effect would practically be produced by the rules remaining in use for a long time. But the mischief of the construction is obvious; for any fraudulent change in the rules might be effected by means of a false affidavit. The rules cannot be removed by certiorari; stat. 10 *G. 4. c. 56. s. 8*.

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Atherton and *Cowling*, contra, were desired by the Court to argue this point before the other points were discussed. The question turns on sect. 4 of stat. 4 & 5 *W. 4. c. 40*. The concluding words of that section peremptorily enact that, after the rules have been certified, they shall be binding on the members and officers of the Society and all other persons having interest therein. Had the intention of the Legislature been, as is suggested on the other side, merely to fix the time at which the rules were to take effect, it would have been easy to have said simply that the rules should not be binding until or unless they were certified. It is obviously for the profit of the Society that there should early be a stage at which the rules should be settled,

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free from question: and, if this was to be done as to any point, it would be done as to all. Now it is not disputed that the barrister has judicial power to determine whether the rules are in themselves conformable to law. [Lord *Campbell* C. J. Because he is expressly required to ascertain that.] Why should his power be limited? He appears to be always treated as a judicial officer. He is first introduced into the operation of Friendly Societies by stat. 10 *G.* 4. c. 56. s. 4., by which the rules are to be sent to the barrister appointed to certify the rules of Saving Banks: and that office is first created by stat. 9 *G.* 4. c. 92. s. 4., where the language equally indicates a judicial power. If the rules have not been properly passed, the dissentients may easily give notice to the barrister, in the nature of a caveat; and then he will not be bound by the affidavit prescribed in sect. 4 of stat. 4 & 5 *W.* 4. c. 40. [Lord *Campbell* C. J. Can he inquire into the facts stated in the affidavit?] It should seem that he may do so if the facts are essential to render the rules conformable to law. [Coleridge J. The proviso at the end of sect. 4 of stat. 10 *G.* 4. c. 56. dispenses with the barrister's certificate if there be an affidavit that the rules or alterations are copied from rules or alterations already enrolled in the same county. That looks rather as if the certificate were required merely for the purpose of securing the propriety of the rules in themselves.] Sect. 8 of that statute makes the confirmed rules binding without any words to shew that the intention was merely to indicate the time from which they become valid. [Lord *Campbell* C. J. That relates to the confirmation by the justices: the functions of the barrister appear to be different.] Stat. 4 & 5 *W.* 4. c. 40. substitutes his authority for theirs; under this

Act they have only ministerial duties. The affidavit required by sect. 4 of the same Act must of course relate to something extrinsic to the rules themselves: it must therefore have been looked to as the proper evidence for satisfying the barrister of the legality of the whole proceeding. [Coleridge J. The affidavit is only that the provisions of the Act have been complied with.] That comprehends the enactments of stat. 10 G. 4. c. 56. s. 9., which lays down the steps necessary to the alteration of rules, and of which the 26th of the old rules is only a transcript. Fraud is not absolutely impossible; but the balance of convenience is in favour of holding that the certificate determines the validity of the alteration, once for all. On such a principle, the Court of Common Pleas decided, in *The Bannock Iron Company v. Barnett (a)*, that the certificate of the registrar of joint stock companies, granted under stat. 7 & 8 Vict. c. 110. s. 7., precluded the shareholders from objecting that the deed on which it was granted was insufficient. [Lord Campbell C.J. There sects. 7 and 8 clearly required him to certify only where a proper deed was presented.] The barrister, by sect. 4 of stat. 4 & 5 W. 4. c. 40., is to advise with the clerk or secretary, "if required;" that is, it should seem, if the clerk or secretary be required by the barrister to confer with him: that gives the barrister full materials for the exercise of his discretion. The danger of fraud is, after all, very slight. By stat. 10 G. 4. c. 56. s. 7. the amendments have no effect till they are entered into the Society's book, which is open to all the members: that makes them notorious to all: and, if the majority

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(a) 8 Com. B. 406. See *Regina v. Phillips*, 8 Q. B. 745.

1854. are dissatisfied with them, a meeting may be called at
 DEWHURST which the rules may be reamended: if the amendments
 v. remain unobjected to, it is cogent proof that there has
 CLARKSON. been nothing to complain of.

The Court postponed their decision on this point: and, on this day, there being a difference of opinion on the Bench, the following judgments were delivered.

Lord
 Campbell C. J.,
 Coleridge J.,
 Wightman J.

LORD CAMPBELL C. J. My brothers *Coleridge* and *Wightman* concur in the opinion which I am about to pronounce: my brother *Erle* differs from us, and will state his views afterwards.

During the argument, I entertained considerable doubt respecting the point on which the rule was granted: but, after looking into the statutes on which it depends, I think that the objection taken to the plaintiff's right to sue was not open to the defendant, stat. 4 & 5 W. 4. c. 40. s. 4. having enacted "that all rules, alterations and amendments thereof, from the time when the same shall be certified by the said barrister," to whom they were submitted, "shall be binding on the several members and officers of the said society, and all other persons having interest therein."

If it had not been for the words "from the time when the same shall be certified by the said barrister," I should have thought it clear that the rules certified were to be absolutely binding. These are rules made in pursuance of the Acts of Parliament; they are signed by three members, and countersigned by the clerk or secretary; and, in case of alterations on amendments of rules, they are accompanied, when transmitted to the barrister, by an affidavit that, in making them, the Acts of Parliament

and the rules of the Society have been duly complied with: and, before they become binding, the barrister must have certified that they are calculated to carry into effect the intention of the parties, and are in conformity to law. A simple enactment that such rules, so made and certified, should be binding would, I think, have prevented any member or officer of the Society from contending that they were not binding by reason of some irregularity in the manner in which they were made. In framing the clause, it might have been better to have said "that the rules so certified shall be binding on the members and officers of the Society and all interested, and shall come into operation when and as soon as they are so certified." But I really think that the meaning of the clause, as framed, is the same.

The intention of the Legislature seems to have been, to give the like effect to the certificate of the barrister under stat. 4 & 5 *W. 4. c. 40. s. 4.* as was given to the confirmation by the sessions under stat. 10 *G. 4. c. 56. s. 8.* I cannot doubt that, when rules had been so confirmed and made binding, a member could not have questioned the regularity of the manner in which they were made. Under stat. 4 & 5 *W. 4. c. 40. s. 4.* a new process for confirming the rules is given; but the object still was to make them binding.

The plaintiffs' counsel, I think, entirely failed in the attempt to shew that the barrister is to inquire into the regularity of the making of the rules, so that his certificate is to be considered a judicial determination of this matter. No such function is vested in him: and those who may think that the rules were irregularly made are not furnished with any means of raising the question. In very rare instances this may produce some

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1854. inconvenience: but faith may generally be given to the signature and affidavit required as preliminaries; and probably much more inconvenience would arise if, after the rules have been certified and confirmed and acted upon, it were competent to any refractory member, at any distance of time, to object that the proper notices were not given of the meeting at which they were agreed to, or that there were not a sufficient number of members present at this meeting, or that, upon a division, the votes on each side were not accurately counted. If, notwithstanding the precautions taken, any rule has been certified by the barrister which was not regularly made, a remedy would be open to a member who disapproves of it, by moving its repeal or modification; and, if there be a majority of the Society who agree with him, the wrong would be redressed. The defendant's counsel admit that the certified rule is *prima facie* valid: but great mischief might arise if this were only a presumption to be rebutted; as then, in every case where a rule is to be enforced, evidence might, without notice, be given of some alleged irregularity in making it. I cannot doubt that it would be for the general benefit of the Friendly Society that the rules, when certified, should be considered binding till repealed and altered: and the language used by the Legislature seems to me fairly to bear this construction. I therefore think that the nonsuit cannot be supported on this ground.

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ERLE J. This was an action brought for the funds of a Friendly Society against the defendant, who was treasurer according to valid rules. The plaintiffs had passed certain resolutions, which they called amendments of these rules: these resolutions had none

of the legal requisites for an amendment of rules, and directly violated the enactment prohibiting any amendment of which notice had not been given at two general meetings; nevertheless they forwarded their resolutions as amendments to the registrar, and obtained his certificate that the amendment was in conformity to law and to the provisions of the statutes. If they made an affidavit that the law had been complied with in making these amendments, it must have been untrue. By these resolutions, if they were valid as amendments, the plaintiffs might be entitled to have the funds of the Society; and they have accordingly brought this action to recover them from the treasurer, making title under these resolutions, which, as they contend, have become valid amendments by reason of the registrar having so granted his certificate: and they say that this is the result of stat. 4 & 5 W. 4. c. 40. s. 4., enacting that all rules and amendments, from the time when they shall be certified by the barrister, shall be binding on the Society and others.

This construction, which appears to me to be contrary to the words and contrary to the intention of the Legislature, and which gives legal success to untruths, is thought to be supported by expediency, because it is supposed to prevent the evil said to be incident to legal inquiry: and, if the parties interested in that which was untruly called an amendment can, by obtaining a certificate on an *ex parte* affidavit, bar all inquiry into the validity of the making of that which is certified, no doubt litigation would be prevented, but at a sacrifice of greater interest; for it seems to me that there is good in allowing all parties interested to have their rights tried according to law. The tribunal may be made

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1854. cheap and speedy according to the subject matter; and
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 v. ex parte secret application of one of the parties interested
 CLARKSON. to bind the rights of the other without giving him an
 Erle J. opportunity of being heard seems a pernicious plan for
 stopping litigation.

Furthermore, this construction seems to me contrary to the words "that all rules," "when the same shall be certified," "shall be binding." It seems to me to render the essential word "rules" of no effect; for it makes that which is no rule to be a rule, and to be binding if it shall be certified.

It is also inconsistent with the declared purpose of the certificate, which is to ascertain the legal tendency of the supposed rules, and not to inquire into the validity of the making of them. The registrar has no power to inquire whether they were legally made: he has only to consider their effect: and, if the same rules have been already certified for another Society, he must, according to sect. 5, certify them again. If an opinion upon the legal tendency of a supposed instrument is to be decisive of the valid making of that instrument, such a decision is upon hazard, not on reasoning.

By the defendant's construction effect would be given to all the words of the enactment in their ordinary sense according to law. If the rules or amendments have been duly made by the Society upon which they are to be binding, the time for their binding is fixed, by this section, to be from the time that they are certified. The Legislature has made careful provisions for the series of steps requisite for the making or altering of rules for Friendly Societies, experience having shewn the evil of facility for sudden changes. Thus, by stat. 10 G. 4. c. 56.,

the process of original making consists in a resolution of the majority of the members assembled (*a*), followed by a certificate of a barrister that they are according to law (*b*), and by a confirmation of justices in sessions, and an enrolment and an entry in the Society's book: and, by sect. 7, no Society is entitled to the benefit of the Act unless all these requisites have been complied with: and for an alteration, by sect. 9, notice at two general meetings of a meeting to alter, and a majority of three fourths at such meeting, is requisite, together with the same confirmations as before. By sect. 8, all rules made as aforesaid, and entered in the Society's books, and confirmed by the justices, shall be binding: here the making, the entry and the confirmation are alike necessary for validity: neither one of these facts precludes the inquiry whether the others exist, although a short presumptive mode of proving all of them is given by the enactment that either the entry in the Society's book, or the transcript enrolled at the sessions, or an examined copy of such transcript, shall be received as evidence of such rules in all cases, that it shall be presumptive evidence of valid rules until the presumption is rebutted. This provision, together with the ordinary presumption from acquiescence, would save unnecessary proof, and check groundless litigation about forms, and still leave to the parties interested in having a real question tried an opportunity to be heard.

Under this statute, requiring a series of numerous steps for the validity of a rule or amendments, the time when the rule became operative may have been doubtful; and therefore the Legislature may have had reason to

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fix the time to be from the certificate of the barrister by the section now in question: at all events the use of this provision in this sense is exemplified in *Bradburne v. Whitbread (a)*, in which a Loan Society, acting under stat. 5 & 6 W. 4. c. 23., which embodies, by reference, the provisions of stat. 4 & 5 W. 4. c. 40. as to rules, had obtained the certificate in *August*, but could not enrol its rules till the sessions in *October*, and took the promissory note on which the action was brought in *August*, after the certificate; and the objection of the defendant, that this was not a Society till their rules were enrolled, was answered by reference to the section now in question, which was held to make the rules operative, before enrolment, from the time of the certificate. The subsequent legislation on Friendly Societies, using the same expression, appears to me to indicate that the Legislature intended to fix the time of the certificate as the time for the rules coming into operation, not that the certificate should prove conclusively that the rules were made.

Thus stat. 3 & 4 Vict. c. 110., relating to Loan Societies, which are in *pari materiâ*, by sect. 4 enacts that the rules, from the time when they shall be certified, shall be binding on all persons interested: and sect. 7 enacts that certain transcripts and copies of the rules, and also that the copy certified by the barrister, shall be received as evidence of such rules; that is, presumptive evidence sufficient, if not rebutted: but, if the certificate created the rules, the certificate itself would be received, not as presumptive evidence of the rule, but as proof.

Stat. 9 & 10 Vict. c. 27., by sect. 12, makes the barrister a registrar (*b*), and repeals the statutes requiring

(a) 5 M. & G. 439.

(b) Sect. 10.

rules to be deposited with the clerk of the peace, and directs rules already deposited there to be sent to the registrar of Friendly Societies, and transcripts of new rules to be kept by the registrar: and then enacts that all rules certified by the registrar shall be of the same force, and all the provisions of stat. 10 *G.* 4. c. 56. shall apply to them, as if they had been confirmed by the justices and enrolled by the sessions. If the certificate alone made them valid rules, it would be inconsistent to enact that a certificate should have as much effect towards making them valid as the confirmation at sessions had theretofore.

Stat. 13 & 14 *Vict.* c. 115., after repealing several former statutes, enacts, by sect. 4, that a majority may make rules: and, by sect. 6, that the Society shall not be deemed to be legally established unless the rules have been certified; and, by sect. 7, that rules shall be certified as of the class either of certified or of registered Friendly Societies; and that all rules, when certified, shall be binding. These two sections appear to me to fix on the time of the certificate as the time when the Society shall be established, and when the rules shall be binding: but it no more creates rules than it creates a Society.

These are the enactments bearing on the question. Thus the words of the section, the purview of the statute, the provisions of other statutes in *pari materiâ*, and expediency, lead me to the conclusion that the certificate of the barrister does not create a rule or amendment, but fixes the time when it becomes operative; and that the defendant is entitled to succeed.

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1854. *Watson and Rew* proceeded to shew cause. The next point is whether, assuming (as must now be done) the new rules to be valid, the plaintiffs have a right to sue. They are trustees; but no one of the three is treasurer, as is required by the 12th of the new rules. It may be questioned whether the defendant is not still treasurer: he has not been formally displaced: but, assuming that the election of *Grune* has the effect of displacing the defendant, *Grune* is entitled to the custody of the money. The trustees, under the 12th new rule, are entitled only to have investments made in their names. Stat. 10 G. 4. c. 56. s. 11. directs the appointment of persons to "the office of steward, president, warden, treasurer or trustee." Stat. 13 & 14 Vict. c. 115. s. 12. directs that "the treasurer or trustee for the time being" shall invest the money not required by the exigencies of the Society. Stat. 10 G. 4. c. 56. s. 21. enacts that all property, money &c. shall be vested in "the treasurer or trustee:" the words "treasurer or trustee" designate the two names by which the same office may be known: but they do not indicate that, where the trustee is not identical with the treasurer, the trustee is to have the custody of the uninvested money.

Atherton and *Cowling*, contra, were then called upon by the Court to answer this objection. The words of sect. 21 of stat. 10 G. 4. c. 56. enable either the treasurer or the trustee, where the offices are distinct, to claim the money. Further, under the 12th of the new rules, one of the trustees is, by being elected trustee, a treasurer; and, though it might be more regular if the Society had appointed one of the three to be treasurer, the right of action is thus in the plaintiffs. Stat. 13 & 14 Vict.

c. 115. s. 12. directs that the trustees or treasurer shall invest the money not wanted for the current liabilities of the Society in the names of the trustees, with the consent of the Society: sect. 13 vests all the property in the trustees: sect. 28 directs that persons holding moneys &c. belonging to the Society shall, on demand, hand them over to the treasurer. [*Coleridge J.* The new rule 12 directs that the treasurer shall invest when the sum unappropriated exceeds 50*l.*] He holds subject to investment in the name of the trustees.

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LORD CAMPBELL C. J. I think the nonsuit ought to stand, the plaintiffs having made out no right to sue. We must now assume that the new rules are binding: but they have not been pursued. Instead of making one of the three trustees a treasurer, three trustees are appointed, and a fourth person is made treasurer. Supposing the election of trustees to be good, what right have they to claim the money? The learned counsel reverted to the Acts of Parliament: but they are superseded by the new rules in this respect. And, under stat. 13 & 14 *Vict. c. 115.*, money does not, before it is invested, vest in trustees of whom no one is treasurer.

COLERIDGE J. I am of the same opinion. The plaintiffs were, I think, well appointed trustees: till then, the money was clearly in the treasurer. Then how does it come to the trustees? One suggestion rather surprised me: that the simple election of the trustees gave them the funds of the Society. In all the Friendly Society Acts you find clauses directing the money to be invested in the names of the trustees: how

1854. could their mere appointment give them what is in other hands? Then as to the new rule 12: that directs that three shall be trustees of whom one is to be treasurer: the treasurer is to invest if the sum in his hands exceed 50*l*: till the investment therefore the money must be in his hands. The provisions of stat. 10 *G.* 4. c. 56. do not interfere with this view: according to them, the money is to be in the hands of a single person called indifferently trustee or treasurer: the essence of the provision is that the person who is really treasurer has the custody of the money. Then reliance is placed on stat. 13 & 14 *Vict.* c. 115. But the new rules would supersede the provisions there; though indeed I think that sect. 13, construed with sect. 12, gives the treasurer the custody of the money till it is invested.

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WIGHTMAN J. I am of the same opinion. Stat. 10 *G.* 4. c. 56. contemplated the money being in the hands of a person who might be called trustee or treasurer, but who was to be, as it were, the banker of the Society. Then the new rule contemplates the election of three trustees, one of whom is to be treasurer: the unappropriated money exceeding 50*l*. is to be invested by the treasurer. No one of these three trustees is treasurer: the money is therefore in the hands of an independent officer. If the defendant is liable to hand over the money, he must do so to the new treasurer. He may be directed by the board of management to invest in the name of the trustees: but, till that is done, the money is to be in the treasurer's custody. Stat. 13 & 14 *Vict.* c. 115. does not touch this point: it shews in whose names the money is to be invested, but does not in the mean time take it out of

the treasurer's hands. I think, therefore, the nonsuit should stand.

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ERLE J. I agree that the plaintiffs have failed to prove a right of action.

. Rule discharged.

JOHN VICK *against* JANE SUETER.

Friday,
January 20th.

EJECTMENT for lands and messuages in *Hampshire*: title laid on 1st *March* 1852. The defendant defended as landlord. On the trial, before *Erle J.*, at the *Hampshire* Spring Assizes, 1853, a special verdict was found, of which the material parts were substantially as follows.

Before and at the time of making his will hereinafter mentioned, and from thence until and at the time of his death, one *John Sueter* was seized in his demesne as of fee chargeable with an annuity of 60*l.* to his wife for life, the first payment thereof to be made within three months of the devisor's decease. "Also I give and devise all that my copyhold estate called *The Mill Field*, consisting of seven messuages," &c., "situate at" &c., "unto my niece *Sally*," "for and during the term of her natural life, charged and chargeable, nevertheless, and I hereby charge the said copyhold estate so given to my said niece *Sally*, to and with the payment of one annuity or clear yearly sum of 25*l.* unto my brother" *E. S.* for life, payable half yearly, the first payment to begin within three calendar months next after devisor's decease; "and, from and immediately after the decease of my said niece *Sally*, I give and devise the same copyhold hereditaments unto and equally between all and every the children of my said niece, share and share alike." "Also I give and devise" freehold land described, "also all and every my other copyhold messuages or tenements, lands, tenements and hereditaments," "whosoever situate, unto my niece *Ann*, her heirs and assigns, charged and chargeable, nevertheless, and I hereby charge the same, to and with the payment of one annuity or clear yearly sum of 20*l.* unto my said wife (in addition to the annuity of 60*l.*)", "for and during the term of her natural life, to be payable half yearly, and the first payment thereof to begin and be made within three calendar months after my decease." There was also a devise of "all and every other my real estates, not hereinbefore otherwise disposed of," to *V.* in fee.

Held that the devise to the children of *Sally* passed only a remainder for life.

That the devise to *Ann* passed, not the reversion in *The Mill Field*, but the other copyholds undisposed of.

And that therefore the ultimate remainder in fee in *The Mill Field* passed to *V.*

1854. fee, at the will of the lord of the manor of *Emsworth*,
VICK in the county of *Southampton*, according to the custom
V. of the manor, of an estate called *The Mill Field*, con-
SUTER. sisting of seven messuages, tenements and dwelling
houses, situate at *Emsworth* aforesaid, being the premises
in question, the same then and still being part and
parcel of the said manor, and a customary tenement
thereof, demised and demisable by copy of the Court
Rolls, by the lord, or by his steward for the time being,
to any person willing to take the same in fee simple or
otherwise, to hold of the lord at the will of the lord,
according to the custom of the manor. The said *John*
Sueter, being so seized, on 10th of *January* 1817, made
and published his last will in writing, signed by him and
attested and subscribed in his presence by three credible
witnesses.

The verdict then set out the will: the material parts
were as follows.

The testator first gave 100*L.* to his wife *Mary*; and
then devised three freehold parcels of land to his nephew
John Sueter, his heirs and assigns, chargeable with an
annuity of 60*L.* to the devisor's said wife for life, the
first payment to be made within three calendar months
of devisor's death. "Also I give and devise all that my
copyhold estate called *The Mill Field*, consisting of
seven messuages, tenements or dwelling houses, situate
at *Emsworth* aforesaid, and held of and under the manor
of *Emsworth*, and duly surrendered to the use of my
will, unto my niece *Sally*, the wife of *Henry Thresher*,
of" &c., "for and during the term of her natural life,
charged and chargeable, nevertheless, and I hereby
charge the said copyhold estate so given to my said
niece *Sally*, to and with the payment of one annuity or

clear yearly sum of 25*l.* unto my brother *Edward Sueter*, during his natural life, to be payable half yearly, and the first payment thereof to begin and be made within three calendar months next after my decease. And, from and immediately after the decease of my said niece *Sally*, I give and devise the same copyhold hereditaments unto and equally between all and every the children of my said niece, share and share alike. But, if my said niece shall happen to depart this life in the lifetime of her said husband, without leaving any children or child lawfully begotten, then I give and devise all and singular my said copyhold hereditaments unto my said nephew *John Sueter*, his heirs and assigns, charged and chargeable to and with the payment of one annuity or clear yearly sum of 50*l.* unto the said *Henry Thresher*, during his natural life, to be payable half yearly, the first payment thereof to begin and be made within three calendar months next after the decease of my said niece *Sally* without issue as aforesaid. Also I give and devise all those my two acres of freehold land situate" &c., "also all and every my other copyhold messuages or tenements, lands, tenements and hereditaments, with their and every of their appurtenances, wheresoever situate, unto my niece *Ann*, her heirs and assigns, charged and chargeable, nevertheless, and I hereby charge the same, to and with the payment of one annuity or clear yearly sum of 20*l.* unto my said wife (in addition to the annuity of 60*l.* given to my said wife and charged upon my freehold hereditaments at *Warblington* aforesaid), for and during the term of her natural life, to be payable half yearly, and the first payment thereof to begin and be made within three calendar months after my decease; and also charged and chargeable, and I hereby charge

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my last mentioned hereditaments, to and with the payment of the residue and remainder of the rents and profits thereof unto my brother *Thomas Sueter*, for and during his natural life, to be payable half yearly, and the first payment thereof to begin and be made within three calendar months after my decease, save and except the yearly sum of 10*l.*, parcel of the said rents and profits, which I direct shall be retained by my said niece *Ann* to and for her own use and benefit." Then followed a bequest of certain personalty. "And, subject to the payment of my just debts, my funeral and testamentary expences, the before mentioned legacy, and the annuities hereinafter given by this my will, I give, devise and bequeath all and every other my real estates, not hereinbefore otherwise disposed of, and all and singular the residue and remainder of my household goods and furniture, plate, linen and china, not chosen by my said wife, and all my bonds, bills, mortgages, ready moneys and securities for money, book debts, and all and singular other my personal estate, of what nature or kind soever I shall die possessed of, and all my estate, right, title and interest therein, unto my said brother *Thomas Sueter* and *John Vick*, of" &c., "their heirs, executors, administrators and assigns. But upon trust nevertheless" &c. (the trusts were not material to the present question).

The said copyhold estate called *The Mill Field*, with the appurtenances, in the said will mentioned and described, is the said land, tenements and premises mentioned and contained in the writ. The testator died on 1st *May* 1822, without altering his said will as to the devise of the said tenements with the appurtenances.

After his death, at a general court baron of the lady and lords of the manor, holden in and for the said manor, on 20th *January* 1823, before the then steward, the homage presented the said will: and thereupon the said *Sally*, the wife of the said *Henry Thresher*, in the entry on the rolls called devisee for life named in the last will and testament of the said *John Sueter*, prayed to be admitted to the said customary tenements, with the appurtenances. Whereupon the lady and lords of the manor at the said court, by the said steward, granted the said customary tenements, with the appurtenances, to the said *Sally*, to hold to the said *Sally*, during her natural life, in pursuance of the will and testament, at the will of the said lady and lords, according to the custom of the manor. And the said *Sally* was then admitted tenant of the said customary tenements in manner and form aforesaid.

The said *Henry Thresher* died in the lifetime of the said *Sally*, his wife, without her having had any issue by him. The said *Sally* afterwards intermarried with *William Mower*; and there was issue of such marriage one child, viz. a son, *William*, who was born in 1829 and died in 1835, an infant. The said *William Mower*, the husband, died in *October*, 1831. The said *Sally* died on 14th *February* 1851, without having been again married, and without having had any child except the said *William Mower*, who died an infant as aforesaid.

The said *Thomas Sueter*, named in the last will, died in *February* 1827, leaving the said *John Vick*, named in the said will, and who is the above plaintiff, him surviving. The verdict then concluded with praying the judgment of the Court whether *Vick* was entitled as in

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1854. the writ alleged, and finding according to such judgment.

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Montague Smith, for the plaintiff. The plaintiff claims the copyhold as survivor of the two joint tenants, residuary devisees in fee simple under the will: and he clearly is so entitled unless the express devise passed a fee simple to *William Mower*, the deceased child of *Sally Thresher*, afterwards *Mower*. The question therefore turns on this express devise, which, the plaintiff contends, passed no inheritance. It is to be recollected that the will was executed before the coming into effect of stat. 7 W. 4 & 1 Vict. c. 26 (a). The copyhold is first given to the testator's niece *Sally* for life by the words "all that my copyhold estate called *The Mill Field*, consisting of" parcels specified in the will. This word "estate" is not repeated in the devise to her children: the language is "I give and devise the same copyhold hereditaments unto and equally between all and every the children of my said niece, share and share alike." The condition following did not take effect. *Sally* survived her husband, *Henry Thresher*, who is the husband designated by the will: and it might be questioned therefore whether a child by any subsequent marriage took any interest at all under the will. But, supposing the devise to point to any children of *Sally*, the word "hereditaments" does not pass a fee; *Moor v. Denn dem. Mellor* (b). There

(a) See sect. 28.

(b) 2 B. & P. 247, in Dom. Proc., reversing the judgment of Exch. Ch. in *Denn dem. Mellor v. Moor*, 1 B. & P. 558; which reversed the judgment of K. B. in *Doe dem. Mellor v. Moor*, 6 T. R. 175. See *Denn dem. Moor v. Mellor*, 5 T. R. 558.

Macdonald C. B. said that he did not conceive that the word "hereditaments" would have the effect of enlarging a devise beyond the legal import of the words used in the will itself; adding: "The settled sense of that word is to denote such things as may be the subject matter of inheritance, but not the inheritance itself, and cannot therefore, by its own intrinsic force enlarge an estate, *prima facie* a life estate into a fee." To the same effect is *Doe dem. Small v. Allen* (a), where Lord *Kenyon* (b) expressed his astonishment that any doubt should have been entertained upon the point. [*Butt*, for the defendant. It will not be contended that the word "hereditaments" alone is sufficient to give a fee.] The attempt will then probably be to connect the words in question with the words used in devising the life estate to *Sally*. In *Doe dem. Small v. Allen* (a) the words were: "as to what real and personal estate it hath pleased Almighty God to bless me with, I give and dispose of the same as followeth:—" "I do hereby give and devise all my messuages, lands, tenements, and hereditaments whatsoever:" yet the word "estate" was held not to give to the subsequent word "hereditaments" a sense indicating a devise in fee. The word "estate" sometimes is merely descriptive of locality; sometimes it is construed to relate to interest, and to be a word of limitation. But it cannot bear the latter sense where the will itself points to the former. That was the case in *Doe dem. Norris v. Tucker* (c), where the words were "my freehold estate called *Pouncetts*," in *Doe dem Gwillim v. Gwillim* (d), and also in *Doe*

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(a) 8 T. R. 497. See *Silvey v. Howard*, 6 A. & E. 253.

(b) 8 T. R. 503.

(c) 3 B. & Ad. 473.

(d) 5 B. & Ad. 122.

1854. *dem. Lean v. Lean* (a), where the words were "an estate called *Lease*." The cases are collected in 2 *Jarman on Wills*, 187 et seq. Here the words in the first instance are clearly descriptive of locality only; and "the same copyhold hereditaments" can therefore not comprehend a fee. But, even if the word "estate" in the first instance carried a fee, it is immediately restricted to an estate for life: and, further, the word "estate" is not carried on to the devise to the children; but the words "the same copyhold hereditaments" are substituted. Reliance will perhaps be placed on the circumstance that the estate for life given to *Sally* is charged with an annuity for the life of *Edward Sueter*. That is a circumstance in favour of an inheritance when the person is charged; but it is not so when, as here, the charge is only on the land, because then the annuity issues out of the land in whomsoever vested, and for whatsoever estate; *Doe dem. Clarke v. Clarke* (b), *Doe dem. Sams v. Garlick* (c). That decision shews that *Andrew v. Southouse* (d) is not now to be considered law, unless upon the assumption, which Lord *Kenyon* appears to make, that the charge there was on the person. The remainder expressly devised to *John Sueter* never took effect, because the event upon which it was limited did not occur, as has already been pointed out. The devise of the "other" copyhold property does not affect the present question.

Butt, contra. The devise passed a remainder in fee to *William Mower*, the infant. It is true that, if "hereditaments" be treated as the governing word, the inheritance does not pass. But the words "from and

(a) 1 Q. B. 229.

(b) 1 Cr. & M. 39.

(c) 14 M. & W. 698.

(d) 5 T. R. 292. See 14 M. & W. 704.

immediately after" and "same" refer back to the words of the devise of the life estate to *Sally*; and the words there are "all my copyhold estate called *The Mill Field*." Now, first, the authorities cited to shew that these words do not convey an inheritance are distinguishable. In *Doe dem. Norris v. Tucker* (a) the word "all" did not occur, as here; and Lord *Tenterden* approved of *Bailis v. Gale* (b), saying that there "the words 'all that estate I bought of *Mead*' might well import the whole interest in the estate, because the testator had in fact bought the fee simple of *Mead*." And it is to be remarked that no one of the cases of *Denn dem. Richardson v. Hood* (c), *Roe dem. Child v. Wright* (d) or *Randall v. Tuchin* (e) was cited in *Doe dem. Norris v. Tucker* (a); yet those three authorities distinctly shew that the word "estate," though followed by a description of site, will carry a fee. In *Doe dem. Gwillim v. Gwillim* (g) the word "estates" was controuled by the words which followed, "as I have appointed and disposed to them in lots and in money;" and then some lots were given with words carrying an estate tail, one without any words of inheritance, and one with words carrying a fee. In *Doe dem. Lean v. Lean* (h) the words were not "my estate," but "an estate called *Lease*," a distinction insisted on by counsel, and adopted by the Court. In favour of the defendant's construction there are the three cases, already mentioned, of *Denn dem. Richardson v. Hood* (c), *Roe dem. Child v. Wright* (d) and *Randall v. Tuchin* (e): and to these may be added *Holdfast*

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(a) 3 B. & Ad. 473.

(c) 7 Taunt. 35.

(e) 6 Taunt. 410.

(b) 2 Ves. Sen. 48.

(d) 7 East, 259.

(g) 5 B. & Ad. 122.

(h) 1 Q. B. 229.

1854. *dem. Cowper v. Marten (a), Andrew v. Southouse (b)*
 VICK (which is an authority on the effect of the word "estate"
 v. as well as on the effect of a charge), *Uthwatt v. Bry-*
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don (e) and Doe dem. Pottow v. Fricker (g). In most of
 these cases the words were "my estate:" those words
 occur here; and, even if they did not, the fee would
 pass; *Burton v. White (h).* [Coleridge J. referred to
Doe dem. Child v. Wright (i) and Doe dem. Wright v.
Child (k).] Secondly, the words "same copyhold here-
 ditaments" coupled with "from and immediately after
 the decease of my said niece Sally," must be understood
 to refer to the "estate" before given, and therefore to
 carry a fee. In 2 *Powell on Devises*, 418 (3d ed., by
Jarman), it is said: "it cannot be doubted that where a
 testator devises an estate, with or without words of
 locality, to A. for life, and then gives 'the same' to B.,
 the latter devise would give B. a fee." [Crompton J.
 In *Roe dem. Bowes v. Blackett (l)*, cited in the preceding
 page in *Powell*, the devise was of "all my estate and
 interest" in certain lands to E. for life, and, from and
 after E.'s decease, "the said messuages, houses, lands,
 and tenements," to two others, "as tenants in common;"
 and it was held that these two took only life estates.]
 That is clearly distinguishable: the words "the same
 copyhold hereditaments" may well be coupled with
 "estate," meaning interest: but "the said messuages,"

(a) 1 T. R. 411.

(c) 6 Taunt. 317.

(e) 4 Taunt. 176.

(h) 7 Exch. 720.

(k) 1 New R. 335.

(b) 5 T. R. 292.

(d) 1 B. & B. 72.

(g) 6 Exch. 510.

(i) 8 T. R. 64.

(l) 1 Cowp. 235.

&c., cannot. Next, as to the effect of the charge of the annuity. It is true that a charge of an annuity simply on the land affords no inference that it is intended to pass a fee. But here the effect is to charge both the niece and her children with the annuity; and each successive tenant for the time being is thus liable to the charge; so that the case seems to fall within the rule in 2 *Powell on Devises*, 395, "that where the charge is upon the devisee in respect of the lands, or, in other words, where the estate is charged in his hands, a fee passes." *Andrew v. Southouse* (a) is in point: other cases are collected in 2 *Powell on Devises*, 389. [Lord Campbell C. J. Lord *Kenyon* seems to have been under a mistake in *Andrew v. Southouse* (a). I cannot see how a fee was necessary here to enable the successive tenants to pay the annuity, nor how any one can be said to be personally charged. *Coleridge J.* Was the tenant for life liable after the first payment of the annuity was due, and before receiving any rent? She was. [Lord Campbell C. J. How could it be enforced?] By action of debt, or perhaps in equity only; but she would become liable by accepting the estate. But it is not necessary to go so far. A bequest of lands and personalty to *G. S.*, "after having thereout first paid and discharged all my just debts and funeral expences," was held to charge *G. S.* personally in respect of both realty and personalty, and therefore to pass a fee in the realty; *Doe dem. Stevens v. Snelling* (b): the explanation of which is thus given in 2 *Powell on Devises*, 388: "If the sum be payable by the devisee, though charged on the lands, he takes a fee; but not on the ground, applicable

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(a) 5 T. R. 292.

(b) 5 East, 87.

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to charges imposed simply on the devisee, that he might otherwise sustain a loss, (though it is sometimes rather inaccurately applied to all the cases,) for, if the payment be out of the land, he cannot possibly be damnified; but because the devisor has imposed upon him a duty, the execution of which requires that he should take the fee;" and the same doctrine is applied to a charge by way of annuity, at p. 390. [*Crompton J.* If your argument be good, it would shew that *Sally* took a fee.] The implication can of course not prevail against express words. Lastly, it is not clear that, if life estates only are given by the clauses hitberto noticed, the remainder will not pass by the words "other copyhold messuages" &c. [*Lord Campbell C. J.* These other copyhold estates are charged with another annuity: is that a charge on *The Mill Field*?] Either it is so, or an inference arises that the previous charge on *The Mill Field* was a charge on the children of *Sally*.

Montague Smith, in reply. In *Roe dem. Bowes v. Blackett* (a) Lord *Mansfield* uses reasoning very applicable to the first point here. "The third argument is drawn from the words which follow the description of the messuages preceding the demise to the wife for life; namely, 'all my estate and interest therein,' and from thence it has been insisted, that no words of limitation were necessary. But these words added precedent to an estate for life, can have no meaning at all; and it is remarkable that they are left out in the devise to his half sisters, which shews that the testator meant nothing by using the expression in the devise to his wife." *Doe*

(a) 1 *Cowp.* 239.

dem. Norris v. Tucker (a) has not been distinguished. *Andrew v. Southouse* (b) is relied on. [Lord Campbell C. J. It is a very favourite case for citation under difficulties.] There were two reasons for that decision; and it is not a safe authority on either. (He was then stopped by the Court.)

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LORD CAMPBELL C. J. I have no doubt that the testator intended the children of *Sally* to take a fee: but he has not used words which will effect the intention, according to the established rules of law by which we are bound. A testator, in reality, seldom understands the difference of the effect of the same words upon personalty and realty; yet the law has established rules which do make a difference. The same may be said as to the force of the words "estate of" and "estate in." Attempts are often made to strain the rules of law so as to effect the intention: but we cannot go farther than our predecessors have gone. And there is the less reason for doing this now that the Legislature has interfered and has made the words of limitation no longer necessary for passing the inheritance, so that words which, as the law formerly stood, would have given only a life estate now give a fee. But in the case of wills not under the statute we can hold that the fee passes only where we find words used which have been held to pass it. Mr. *Butt* very properly admits that the word "hereditaments," taken alone, will not carry the fee. But he endeavours to avail himself of words which occur in an earlier part of the will, where "estate" is the term used in the bequest to *Sally*. Now whether this word

(a) 3 B. & Ad. 473.

(b) 5 T. R. 292.

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would, if used without any words of restriction, carry an estate in fee, it is unnecessary to determine, as it was in *Doe dem. Norris v. Tucker* (a); for here, as there, the word is not carried on to the bequest upon which the question arises. Where we do not find the word "same" used, or something equivalent, without variation of the term with which it is joined, we cannot carry the effect of the preceding word down: where the word is varied, as in *Roe dem. Bowes v. Blackett* (b), the prior words lose their effect; we can look only to the words used in the limitation over. Mr. *Butt* then pressed upon us the circumstance that there was a charge of an annuity. But it is clear to me that there is no charge on the person of the devisees: there is a limitation of the remainder, subject to the charge: that is all. The children, though taking only estates for life, might do all that the devise requires of them in respect of the land. Then it is urged that the land will not pass under the general residuary clause, but will go to the niece *Ann*. But I think the deviser supposed that he had disposed of all the interest in the copyhold *The Mill Field*, and then went on to dispose of other copyhold land, not of any undisposed of interest in *The Mill Field*. *The Mill Field* therefore is, after the life estates, left undisposed of, and will pass under the general residuary devise.

COLERIDGE J. I am entirely of the same opinion. A copyhold estate, called by a particular name and so described in the devise, is devised for life. Then there is a devise, not of the same estate, but of "the same

(a) 3 B. & Ad. 473.

(b) 1 Cowp. 235.

copyhold hereditaments:" and the question is, what interest this gives in the remainder. That is a question of intention: and, to find this out, we are sometimes driven to resort to what we cannot deny to be very technical distinctions, and which possibly, if it were res integra, one might not be prepared to adopt. But one must exercise one's common sense. It has been held, and, I think, on sufficient grounds, that the word "estate," even when followed by the word "in" such a place, gives all the property which the devisor has in the place, unless words are added indicating a restriction: and there might be a fair question if we now had to decide on the devise to *Sally*, and there were no words limiting her interest to a life estate. But, when you come to the devise to the children, you do not find that word again: you therefore can draw no inference that the devisor meant to give the "estate" to the children, when you find him going out of his way to use words not meaning the same thing. *Doe dem. Norris v. Tucker* (a) and *Rowe dem. Bowes v. Blackett* (b) seem to govern this case. As to the charge of the annuity, I was rather surprised to hear the point so much pressed. I have nothing to add to the remarks made by my Lord. Then it is suggested that the case for the defendant may be supported by the first of the two residuary clauses. After several devises of different parcels of property, including *The Mill Field*, the copyhold property now in question, there comes a devise of "all and every my other copyhold messuages or tenements, lands, tenements and hereditaments" to the devisor's niece *Ann*, her heirs and assigns: and it is suggested that this

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(a) 3 B. & Ad. 473.

(b) 1 Cowp. 235.

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includes the reversion in fee in the copyhold *The Mill Field*. The words are, no doubt, large. But, when we examine whether this was really and truly the devisor's intention, we find words shewing that it could not be so. Whatever was the property meant, it is made chargeable with an annuity to the wife for her life, besides the annuity of 60*l.* previously given to her. And not only that, but, in order to suppose this to include *The Mill Field*, we must suppose that a reversion upon the estates of devisees for life is devised subject to an annuity which will take effect within three calendar months after the devisor's decease. It appears, therefore, conclusively to me that this property is not identical with the property charged before.

WIGHTMAN J. The question is, whether there are words sufficient to give the inheritance to the children of *Sally*. It is agreed that the words of that part of the devise are not of themselves sufficient for the purpose. But it is said, for the defendant, that they are sufficient, by reference to the words of the previous devise to *Sally* for life; for that "estate," there used, comprehends, not merely the subject matter of the devise, but also all the interest of the devisor in it. No doubt the word may sometimes have that effect. I should myself be much disposed to consider that the word, as here used, did not mean the whole of the devisor's interest. Reliance was placed on *Roe dem. Child v. Wright* (a). There the words were "all my estate, lands, &c. known and called by the name of the *Coal Yard*:" and Lord *Ellenborough* laid much stress on the circumstance that, by considering

(a) 7 *East*, 259.

the word “‘estate’ as expressive of the entire interest,” and the word “‘lands’ as expressive of the particular subject matter or particular kind and quality of thing in which such entire interest subsists,” each word would “have its proper signification;” whereas, on the opposite construction, “estate” and “lands” must be made to mean the same thing. But, in the present case, it seems to me that the word “estate” is used only in its popular meaning, to denote the subject matter of the devise. Assuming, however, that it would in itself mean the devisor’s whole interest, that is clearly not the meaning here; for it is applied to an estate for life. It is said that the word is to be understood as carried down to the devise to *Sally’s* children. If so, it seems somewhat odd that the word is not repeated. In the cases cited on this point for the defendant either the word was repeated, or there was something equivalent to a repetition. But here the subsequent words are “the same copyhold hereditaments,” which could not have the same meaning as “estate” denoting the amount of interest. So that, finding in the first instance the word “estate” used in a limited sense, we are called on to say that its sense is extended by the subsequent occurrence of words not having the same meaning. The argument suggested from the charge of the annuity is disposed of by my Lord: there is clearly no charge on the person; and therefore there is no ground for enlarging the meaning on that ground. As to the construction of the words “other copyhold,” for which the defendant’s counsel contends, I agree in the opinions expressed already, and mainly on the ground that there is a charge on those lands of another annuity to be paid within three calendar months of the devisor’s death, whereas, if

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 take effect till the expiration of the particular estates.

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CROMPTON J. I am of the same opinion. I entertain no doubt on any of the points, and entirely agree in the reasons given, to which it is quite unnecessary to add any thing.

Judgment for plaintiff.

Friday,
 January 20th.

JOSEPH THOMPSON *against* HENRY BELL, JOHN
 ATKINSON, JAMES ALEXANDER, JOHN SPENCE
 and JAMES BELL.

To an action
 for money
 payable by
 defendant to
 plaintiff, de-
 fendant
 pleaded that
 C., a joint
 debtor with
 defendant,
 resided beyond

COUNT for money payable by defendants to plaintiff
 for wages payable from defendants to plaintiff for
 the service of plaintiff by him done as the hired servant
 of defendants at their request, and for money found due
 from defendants to plaintiff on accounts stated between
 them.

the seas in *California*, a State forming part of the *United States of America*, within the jurisdiction of a court of that State. That, by the law of *California*, a creditor might voluntarily assign his debt to another person, who might in his own name sue the debtor. That plaintiff, being in *California*, assigned the debt to *R.* there, and *R.*, in his own name, sued the defendant and *C.* for that and other debts in a Court there having jurisdiction for the recovery of such assigned debts, and recovered judgment for the debts; and defendant and *C.* were liable to be sued by *R.* in this country upon the judgment. That the judgment was for an entire sum, making no distinction between the debts, and was partly satisfied by the levy of a sum less than the amount of the judgment, and not applicable to any of the debts recovered more than to any other.

Replication. That the law of *California* was, that the assignee might reassign to the creditor the debt, or so much thereof as was unsatisfied, and the creditor might sue in his own name for so much, as if no such assignment had been made, notwithstanding the creditor in the meantime had recovered judgment, unless the whole was actually levied. That *R.*, before he had received any part of the debt, or before any sum applicable thereto had been levied, reassigned to plaintiff; by reason whereof plaintiff became entitled to sue for the debt in his own name, as if there had been no such assignment as mentioned in the plea.

Held: that, assuming the plea to shew that the assignment, made in *California*, by the law of that country transferred the exclusive right to sue (in which case, *semble*, the plea was good), it was answered by the replication.

Plea (fifth). That the contracts and debts in the declaration mentioned were made and contracted, not by the defendants alone, but by the defendants jointly with *Christopher Bell, &c.* (five others): that, before and at the time of the making the assignment hereafter mentioned, and from thence until and at the time of the recovering of the judgment hereafter mentioned, the said *Christopher Bell* resided beyond the seas, in the State of *California*, being part of the *United States of America*, and in a certain part of that State which, during all the time aforesaid, was within the jurisdiction of a certain Court of law of that State, being the District Court of the Fourth Judicial District. That, before and at the time of the making of the said assignment, and from thence until and at the time of the recovering of the said judgment, the law of the said State of *California* was, that a creditor might voluntarily assign to another person a debt or debts due to such creditor, and that the person to whom such debt or debts were so assigned might, in his own name, sue the person or persons owing such debt or debts for, and recover from such person, such debt or debts. That, during all the times aforesaid, the said Court was a Court having jurisdiction and authority to hear and determine any suit brought by such assignee as aforesaid against such debtor or debtors as aforesaid for the recovery of such assigned debt or debts as aforesaid, and to give judgment for such assignee for the recovery of such debt or debts against such debtor or debtors. That, after the accruing of the said debts in the declaration mentioned, the plaintiff, then being in the said State of *California*, did, according to the said law of that State, voluntarily assign to one *Thomas G. Robinson*,

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then also being in the said State, the debts in the declaration mentioned. That afterwards, and before this action, *T. G. Robinson*, in his own name, sued in the said District Court the defendants and the said other persons from whom, jointly with the now defendants, the said debts were due as aforesaid, for the said debts and other debts. That such proceedings were thereupon had in the said District Court, in the said suit, that afterwards, and before this action, *T. G. Robinson*, by the consideration and judgment of the said District Court, recovered against the now defendants and their said joint debtors the said debts in the declaration mentioned, and the said other debts: whereupon and whereby defendants and their said joint debtors, before this action, became and still, except so far as the said judgment has been satisfied, are indebted to *T. G. Robinson* in the amount of the debts in the declaration mentioned for and on account of those debts, and liable to be sued by the said *T. G. Robinson* in this country for the same upon and by virtue of the said judgment. That the said judgment was a judgment for one entire sum, making no distinction between the debts in the declaration mentioned and the other debts which *T. G. Robinson* sued for as aforesaid. That afterwards the said judgment was partly satisfied by the levy of a sum of money less than the amount of the judgment, and not applicable to any one of the debts recovered more than to any other.

Demurrer. Joinder.

Replication. That, before and at the time of the making of the reassignment hereafter mentioned, and from thence until and at the time of the commencement of this action, the law of the said State of *California*

was, that the assignee or person to whom a debt or debts had been voluntarily assigned by the creditor or person to whom such debt or debts had first accrued might reassign, or give up and relinquish, to and for the benefit of such creditor such debt or debts, or so much thereof as at the time of such reassignment or giving up and relinquishment remained unsatisfied or unpaid and unlevied; and that such creditor or person to or for the benefit of whom such debt or debts was or were so reassigned or given up and relinquished might, in his own name, sue the person or persons, or any of them, owing such debt or debts, or any part thereof, for, and recover from such person or persons so sued, such debt or debts, or so much thereof as should then remain unlevied and unsatisfied and unpaid, and retain the same to his own use in like manner as if no such assignment had been made: and that notwithstanding that in the mean time such assignee might in his own name have sued the person or persons owing such debt or debts in the said Court in the said fifth plea mentioned for such debt or debts, and have recovered the same by the consideration or judgment of such Court, and caused execution to be issued thereon, unless the whole amount thereof should have been actually levied under and by virtue of such judgment and execution. That after the making of the said alleged assignment in the said fifth plea mentioned, and before *T. G. Robinson* had received the said debts in the declaration mentioned, or any part thereof, or before the same or any sum of money applicable thereto or to any part thereof had been levied, and whilst such debts remained wholly unpaid and unsatisfied and unlevied, *T. G. Robinson*, being in the

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said State of *California*, did, according to the said last mentioned law of that State, reassign and give up and relinquish to and for the benefit of plaintiff the said debts in the declaration mentioned. That in fact *T. G. Robinson* has never hitherto received or levied the said debts in the declaration mentioned, or any part thereof, nor received or levied any moneys applicable thereto, and sufficient to satisfy the same. By reason whereof plaintiff, before this suit, became and was entitled, by virtue of the said last mentioned law, in his own name to sue for and recover the said debts in the declaration mentioned, and every part thereof, and to retain the same to his own use, in like manner as if no such assignment as in the said plea mentioned had been made.

Demurrer. Joinder.

Atherton, for the plaintiff. First, the plea is bad. If it had stopped at the allegation of an assignment good under the law of *California*, it is clear that no bar would have been set up to an action in this country. It is shewn in *Story On the Conflict of Laws*, s. 565, that, in a country where a chose in action is not assignable, no action can be brought in the name of an assignee, though the assignment was made in a country where choses of action are assignable, because "the inquiry, in whose name a suit is to be brought, belongs not so much to the right and merit of the claim, as to the form of the remedy." And, in sect. 566, the author discusses the case where the law of the foreign country vests in the assignee a legal right to sue in his own name, and says that there are dicta and decisions pointedly shewing

"that the suit must be brought in the name of the assignor, if the *lex fori* requires it." He refers to some *English* authorities, which, it is true, contain only dicta on the point. In *Wolff v. Oxholm* (a), where an action had been brought in a *Danish* Court by the assignees of a debt, Lord *Ellenborough*, delivering the judgment of the Court, said: "The assignee could not sue in the Courts of this country in his own name; the action must have been brought here in the names of the original creditors, even if they had assigned the debt for a valuable consideration;" and this on the assumption that "the assignment gave the assignee a right to sue in his own name in *Denmark*." In *Folliott v. Ogden* (b) the Court, speaking of the effect of the vesting a bond in any other than the obligee, in a country of which the laws permit such vesting, say: "The subject matter of this action being a bond, it could only be sued for according to the laws of *England* relating to bonds; supposing therefore the right of the plaintiff to be gone, that could not be set up in bar of the action, which must be brought in the name of the present plaintiff, whoever might be in possession of the bond, since a chose in action is not assignable in law, and the defendant could not plead, that the obligee had assigned it." In *General Steam Navigation Company v. Guillou* (c) the Court say: "the plaintiffs contend, that the plea only means, that in the *French* Courts the mode of proceeding would be to sue the defendant jointly with the other shareholders of the Company under the name of their association: and, if this be the true construction of the plea, we all concur in the opinion that the plea is

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(a) 6 M. & S. 92. 99.

(b) 1 H. BL 123. 135.

(c) 11 M. & W. 877. 895.

1854. bad; for it is well established, that the forms of remedies
 THOMPSON and words of proceeding are regulated solely by the law
 v. of the place where the action is instituted—the *lex fori*;
 BELL. and it is no objection to a suit instituted in proper form
 here, that it could have been instituted in a different
 form in the Court of the country where the cause of
 action arose, or to which the defendant belongs.” In
Leroux v. Brown (a) a question arose whether an agree-
 ment, which, for non-compliance with the 4th section of
 the Statute of Frauds, could not be enforced if made in
England, could, if made in *France*, in conformity with
French law, be enforced here; and it was held that it
 could not, because “the fourth section applies not to the
 solemnities of the contract, but to the procedure; and
 therefore that the contract in question cannot be sued
 upon here;” per *Jervis* C. J. (b). Then the additional facts
 do not raise a defence. The judgment, supposing it to
 be for the debt sued for in the present action, is no bar
 without satisfaction. A judgment in a foreign Court is
 not of so high a nature as to create a merger; *Hall v.*
Odber (c), *Smith v. Nicolls* (d). It seems that either the
 party who has recovered the foreign judgment, or the
 original creditor, might sue here: the case is one of
 those in which the party who first claims the right
 succeeds: this sometimes happens in the case of bailor
 and bailee. [Lord *Campbell* C. J. referred to *Bank of*
Australasia v. Nias (e).] That case shews that the
 foreign judgment works no merger. [*Crompton* J. It
 does not appear but that the plaintiff here may be suing
 as trustee for the *Californian* assignee.] It does not:

(a) 12 *Com. B.* 801.(b) 12 *Com. B.* 824.(c) 11 *East*, 118.(d) 5 *New Ca.* 208.(e) 16 *Q. B.* 717.

and a judgment and satisfaction in this case might be pleaded in bar to an action upon the foreign judgment. There is some analogy between the foreign judgment and collateral securities, as bills of exchange, which cannot be pleaded in bar unless they have been paid; *Tarleton v. Allhusen* (a). [Wightman J. Suppose the plaintiff recovered in his own name in the foreign Court: what would the defendant plead if sued here?] Judgment and satisfaction: less than that would afford no answer. [Lord Campbell C. J. He could not, according to *Bank of Australasia v. Nias* (b), if sued on the judgment, set up here any defence which he might have set up in *California*.] The plea, upon any view, does not go far enough: it should shew that the assignor could no longer sue in the *Californian* Courts; but it shews only that the assignee could sue there and had recovered judgment. In *Plummer v. Woodhouse* (c) it was held that a plea of judgment for defendant in a colonial Court was bad for not shewing that the judgment was conclusive there.

But, assuming the plea to be good, it is answered by the replication: that shews a re-assignment to the original creditor, which, by the law of *California*, gives a right to the original creditor to sue, notwithstanding recovery of judgment by the assignee, if any part of the debt remains unsatisfied. That is at least as reasonable a law as the law alleged in the plea. [Lord Campbell C. J. It is at any rate not so repugnant to justice as to compel its disallowance by this Court. *Crompton J.* You do not say that the assignee cannot still sue.] That is unnecessary: the plea does not shew that the assignor

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(a) 2 A. & E. 32.

(b) 16 Q. B. 717.

(c) 4 B. & C. 625

1854. was ever incapable of suing. But, if it could be so
THOMPSON construed, the replication would still be well enough;
v. for then it must be construed as shewing that the
BELL. assignee, after his reassignment, could not sue.

Cowling, contra. The plea is good. The plaintiff is shewn to have assigned the debt, intending (since he must be presumed to know the law) that the assignee should sue upon it. It is immaterial where the debt was originally contracted: it must follow the person. The assignment makes the assignee owner of the debt; that is, sole owner. It is by no means clear that *Story* considers the assignee incapable of suing for the debt in any country. He cites *Alivon v. Furnival* (a), where a question arose whether two of four appointees could sue in *England*, the appointment being an instrument made in *France* under the *French* law, and authorizing, in its terms, the appointees to act jointly, or separately in case those not acting were hindered from acting or were absent, and no hindrance or absence appearing in that case: and the Court there said (b): "This is a peculiar right of action, created by the law of that country; and we think it may by the comity of nations be enforced in this, as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires." That case is the stronger, because the *French* instrument transferred to the appointees no interest, but only the power to act for those interested. The rule as to corporations, there assumed, seems to encroach upon the *lex fori* much further than the

(a) 1 C. M. & R. 277.

(b) 1 C. M. & R. 296.

defence set up by this plea. *Wolff v. Oxholm* (a) is distinguishable: nothing there took place in the foreign country, except that the party to whom the assignment had been made in this country went to the foreign country and there sued. If the assignment in that case had been made in the foreign country the present point might have arisen. And there it was said (b): "although the assignment gave the assignee a right to sue in his own name in *Denmark*, yet the defendant does not appear to have been prejudiced by that measure even there, nor has any material consequence resulted therefrom." But, in the present case, part of the debt has been levied under the foreign judgment: and, further, the position of the parties has been changed, because the judgment is conclusive as to the facts, until impeached; and indeed this would be so, even in the absence of express allegation of jurisdiction; *Robertson v. Struth* (c). If an action were brought here on the judgment, it would be conclusive evidence against the defendant of the facts necessary to the judgment. [*Wightman J.* Suppose the plaintiff, instead of assigning, had recovered judgment in *California* in his own name, and levied execution for a part: what would the defendant plead to another action brought here?] He would plead satisfaction pro tanto: but here in fact parties are changed. [Lord Campbell C. J. You bring it to the question whether the creditor, by the foreign assignment, parted with all right to sue, like the transfer of right by the indorsement of a negotiable instrument.] That is the point. In *General Steam Navigation Company v. Guillo* (d) the dictum related merely to the form of remedy, and of

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(a) 6 M. & S. 92.

(b) 6 M. & S. 99.

(c) 5 Q. B. 941.

(d) 11 M. & W. 877. 895.

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course the *lex fori* would prevail. The same remark applies to *Leroux v. Brown* (a). The dictum in *Folliott v. Ogden* (b) related to the effect, not of an assignment by a creditor, but of a foreign penal law of forfeiture.

Then, as to the replication. The law there alleged goes beyond what this Court can possibly adopt. It may be that the courts in *California* would restrain the creditor, to whom the debt is reassigned, from issuing execution for so much of the debt as is already levied. But, according to the law as suggested in this replication, the judgment in *California* might still remain effectual for the sum not levied, although the plaintiff had recovered it here. It appears that the reassignment took place before any levy, yet there was a levy afterwards. [*Atherton*. The judgment comprehended other debts.] The record does not shew that the levy was confined to those. [Lord Campbell C. J. You want to insist on part of the foreign law, and repudiate the rest.] This Court will allow so much as consists with natural justice, and no more; the comity of nations goes no further; *Story On the Conflict of Laws*, ss. 35, 36, 37, 38. And there is this further difficulty: that, the judgment being for the aggregate of several debts, it does not appear how the judgment creditor could separate the particular debt and reassign it.

Atherton, in reply, was stopped by the Court.

LORD CAMPBELL C. J. I am of opinion that the replication is good. But, first, as to the plea. What does it amount to but this? A chose in action, not

(a) 12 Com. B. 801.

(b) 1 H. Bl. 135.

assignable by the law of *England*, is so by the law of *California*: and what does that mean, but that all right which the assignor has he gives to the assignee? If so, the assignee has the right exclusively. The case is like that of the indorsement of a bill of exchange; the indorser cannot sue; the indorsement would be a bar to his action all the world over. If, therefore, the plea shews such an assignment as vests all the assignor's right in the assignee, it is good: but then, *pari ratione*, the replication is good, which shews that there may be a reassignment, and that there was such a reassignment in fact: and, that being so, *Thompson* might sue either in *California* or in *England*. The case is the same as if the assignee had assigned to a third person: in that case, neither the creditor nor the first assignee would have had any right left, and *Thompson* could not have sued, nor the first assignee. If, therefore, the law respecting the assignment be good, the replication answers the plea. It is, however, argued that the replication relies upon a foreign law which is contrary to natural justice: but I think that we must take the foreign law as a whole, and that we cannot take a part and reject a part; nor do I see that the law, as laid down in the replication, leads to any unjust consequences, or that there is any greater objection to a reassignment than to an assignment of a chose in action. We may therefore adopt the law as alleged in the replication as well as that alleged in the plea. The replication therefore is good; and the original creditor has his right of action again.

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WIGHTMAN J. (a). I am entirely of the same opinion.

(a) Coleridge J. had left the Court.

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By the common law of *England*, a chose in action cannot be assigned; but, by the law of *California*, not only the right to sue, but the whole right of the creditor, can be assigned. If, therefore, we had only the plea to look to, that would shew a good answer to the action. But the replication shews that the claim in an action may be reassigned where a judgment has been recovered, provided that the whole debt has not been levied. It is argued that injustice would arise from this. I do not see that it would: we have no right to presume that the Courts of *California* would act unjustly; and it may be that they would restrain a party to whom there had been a reassignment from levying execution for any debt already satisfied. It does not appear here that any execution had issued under which any money had been levied applicable to this particular claim. We therefore can see nothing that is necessarily unjust.

CHAMBERLAIN J. I am of the same opinion. We must construe the plea as meaning that the debt and the right to sue both passed to the assignee. If the plea therefore be good, the replication alleges, still more strongly, that both may be reassigned back again to the extent of the amount not levied. We are not entitled to suppose that, after this, the execution and the judgment can go on. The replication is more clearly good than the plea; for it states that after the reassignment the original creditor may sue for the debt as if there had never been any assignment at all.

Judgment for plaintiff.

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The QUEEN, on the relation of WILLIAM MACKLEY, *Saturday, January 21st.*
against RICHARD COAKS.

INFORMATION in the nature of quo warranto for exercising the office of Mayor of *Norwich*.
 Plea: That the city of *Norwich* is named in Schedule (A.) to stat. 5 & 6 *W. 4. c. 76.*, and was in pursuance of that Act divided into eight wards; that there are sixteen aldermen and forty eight councillors of the said city. That defendant was, during his tenure of the office of mayor and for two preceding years, a rated householder qualified to be a burgess, and actually on the burgess list, and qualified to be a councillor, and was, on 9th *November* 1851, duly elected to be a councillor, and that no application for a quo warranto against him for holding the office of councillor was made for twelve months after his election; and that, on 9th *November* 1852, "at a meeting of the council of the said city of *Norwich*, duly convened and held according

Information in the nature of quo warranto for the office of mayor of a borough. Issue whether defendant was duly elected. Special verdict, in substance as follows: At an election for councillor for the borough, in *November* 1851, *B.* and *C.* were candidates. *B.* at the time was disqualified, being an alderman, which fact was known to the voters. *B.* had a majority of votes, and was returned, accepted the

office and acted. *C.* obtained a rule for an information in the nature of a quo warranto, which was made absolute in *Easter* term 1852. The information was filed. *B.* disclaimed; and judgment of ouster was signed on 3d *July* 1852. On 26th *October* 1852 *C.* gave notice to the town council requiring them to admit him, on the ground that the votes for *B.* had been thrown away. On 8th *November* 1852, *C.* accepted the office and signed the declaration required by the statute: of all which the town council had notice. On the 9th *November* an election was held for the office of mayor: the defendant and *M.* were candidates. *C.* tendered his vote for *M.* It was rejected; and, the other votes being even, defendant was elected by the casting vote of the presiding officer.

Held, that the votes given for *B.* were thrown away: and that *C.* was councillor; that, the usurpation of the office by *B.* having rendered it impossible to accept the office within five days after notice of his election, he was excused from doing so; and that when *B.* was ousted *C.* ought to have been admitted.

Held also, that, supposing *C.* had been bound to accept within five days after notice, the special verdict did not shew that *C.* had notice of his election, inasmuch as it only disclosed evidences of that fact.

Held therefore, on both grounds, that it appeared on the special verdict *C.*'s vote at the election of mayor was improperly rejected.

Judgment for the Crown.

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to the statutes, for the election of a mayor of the said city, the defendant, being such councillor, and being a fit person to be mayor of the said city, and being entitled to be on the citizens' list of the said city, and in every respect qualified to be mayor of the said city, was duly and in accordance with the provisions of the said Act by the council of the said city, duly and according to the statutes in such case made and provided, elected to be the mayor of the said city for one whole year then next and until his successor should have accepted the said office, and made the requisite declaration in that behalf. Averments of acceptance, declaration, and qualification on defendant's part; and by that title he claimed the office.

Replication: That defendant "was not, duly and according to the statutes in such case made and provided, elected to be the mayor of the said city of *Norwich*," modo et formâ: conclusion to the country. Issue thereon.

Special verdict. That *Richard Cundall* was, in *November* 1851, in all respects qualified to be a councillor; that, at an election of two councillors for the fourth ward, then held, *Charles Winter*, *Robert Wiffin Blake* and the said *Richard Cundall* were candidates; that the number of votes for each were: for *Winter*, 146; for *Blake*, 117; and for *Cundall*, 112. That *Blake* then was disqualified to be a councillor, being an alderman; that those who voted for *Blake* had notice that he was disqualified; nevertheless the presiding officer declared *Winter* and *Blake* elected councillors. That *Blake* accepted the office of councillor and acted as such. That, on 7th *May* 1852, the present relator obtained a rule absolute for an information in the nature of a quo warranto against *Blake*; that, on 14th *May* 1852,

the information was filed; that, on 30th *June* 1852, *Blake* disclaimed; that, on 3d *July* 1852, judgment of ouster was signed against him; that, on 26th *October* 1852, notice in writing was given by *Cundall* to the mayor, aldermen and citizens of the city of *Norwich*, requiring them to admit him as councillor, instead of *Blake*, on the ground that the votes given for *Blake* had been thrown away, and that therefore *Cundall* was duly elected. That, on 8th *November* 1852, *Cundall* accepted the office of councillor, and made and subscribed the oaths and declaration required by the statutes: of all which the then mayor and the town clerk had notice. That, on 9th *November* 1852, at the meeting of the council for the election of a mayor for the ensuing year, two councillors, the defendant and *Samuel Bignold*, were candidates; that *Cundall* tendered his vote as councillor for *Bignold*, which vote the then mayor rejected: that the votes, excluding that of *Cundall*, were twenty seven for defendant, and the same number for *Bignold*; and thereupon the then mayor gave his casting vote for the defendant. And the jury referred it to the Court to say whether the defendant was duly elected.

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Welsby, for the relator. The whole question turns upon *Cundall*'s right to vote in the election of mayor. If he was properly rejected, the defendant was rightly elected; if he was improperly rejected, the defendant is an usurper. It is clear that *Cundall* ought originally to have been returned instead of *Blake*; for the votes for the latter, being given after notice of his disqualification, were thrown away; *Rex v. Hawkins* (a). If *Cundall* had

(a) 10 *East*, 211.

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been returned, it would have been his duty, within five days after he had notice, to accept the office, making and signing a declaration, according to stat. 5 & 6 W. 4. c. 76. s. 51., under penalty of a fine, and of the office being vacant. But, the office being full of *Blake*, he could not comply with that section, which must be taken to be confined to cases in which it can be complied with. The notice means official notice; *Regina v. Preece (a)*. *Cundall* never had such official notice till after the office was full; and he could do nothing till ouster.

Willes, contra. *Cundall* did not in fact comply with sect. 51 by making and subscribing the declaration, till the 8th of *November* 1852. Unless, therefore, he was taken out of the operation of sect. 51, and entitled to hold the office without making the declaration within the five days, the office of councillor was vacant, and there should have been a new election under sect. 47. The officer presiding at the election of mayor could not enquire whether the voters for *Blake* had or had not, at the time of his election as councillor, notice of his want of qualification. All that he could do was to look at the list under sect. 35, where he would not see *Cundall's* name. The person put on that list is in the possession of the office; *Regina v. The Mayor &c. of Leeds (b)*. [*Crompton J.* According to your argument, there must always be a new election whenever the wrong person has been returned, for whatever reason. There have been very many cases in which elections have been set right where the return had been made in consequence of the personation

(a) 5 Q. B. 94.

(b) 11 A. & E. 512.

of voters and similar causes; yet your position is quite new. The practice has, I think, been to take a mandamus to admit the party, which no doubt is convenient; but the mandamus cannot give a title; it presupposes a title to be admitted.] At all events he should have made the declaration under sect. 51. [Lord *Campbell* C. J. At what time?] He might have done so within five days after he knew of his election in *November* 1851; but it is not necessary to go so far. It is sufficient to say that he ought to have done so within five days of his having notice of the ouster. Here, on 26th *October*, he gives formal notice himself of the fact; and he does not make the declaration till the 8th *November*.

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Welsby, in reply, was desired by the Court to confine himself to the last point. Sect. 51 applies only to a person having notice of the original election, and able to comply with it. It cannot be that a person is liable to a fine for not accepting an office already full of an usurper. But the special verdict does not raise the question. The notice given on 26th *October* by *Cundall* is very cogent evidence that *Cundall* had himself had notice; but it is not conclusive of the fact; and in a special verdict facts, not evidence, must be found.

LORD CAMPBELL C. J. I must say this appears to me to be a clear case. It depends entirely on *Cundall*'s right to act as a councillor on 9th *November* 1852. If he had a right so to act, the defendant was not then duly elected as mayor, and is an usurper. Now *Cundall* clearly was elected councillor in *November* 1851, just as much as if *Blake* had not then stood at all. *Blake* was, in fact, a candidate; but he was an alderman, and

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therefore ineligible; and that fact was known to the electors. Now it is the law, both the common law and parliamentary law, and it seems to me also common sense, that, if an elector will vote for a man who he knows is ineligible, it is as if he did not vote at all, or voted for a non-existent person; as it has been said, as if he gave his vote for *The Man in the Moon*. That was clearly the law before the Municipal Corporation Reform Act; and there is nothing in that Act to alter it. Sect. 35 says that such persons, "as shall have the greatest number of votes, shall be deemed to be elected." Now *Cundall* had the greatest number; for the votes for *Blake* were thrown away. But Mr. *Willes* now argues, as the returning officer, in violation of his duty, returned *Blake*, and *Blake* usurped the office and acted in it, that, when he was ousted, there must be a new election. But there was no vacancy then; *Cundall* had been duly elected, and was entitled to be admitted. That brings us to the question whether he was too late in the steps he took to be admitted. Now, first, I think that the provision in sect. 51, that "every such person so elected shall accept such office by making and subscribing the declaration hereinbefore mentioned within five days after notice of his election, otherwise such person shall be liable to pay the said fine as for his non-acceptance of such office, and such office shall thereupon be deemed to be vacant," is not applicable to such a case as this. It applies to a case where a person has been returned, and has notice that he has been returned, and can accept the office. Then he must do so, or he incurs a penalty. But it is not applicable where the person has not been returned, but another has, so that he cannot accept the office till after the usurper has

been ousted by quo warranto. In such a case the penalty cannot apply to a person who has not the power of complying with the enactment. And, further, I think that, if the law was otherwise, the special verdict in this case does not find that *Cundall* had notice of his election. I think, therefore, the defendant is an usurper, and that judgment must be for the Crown.

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CROMPTON J. (a). I think it quite clear that, when *Blake* was ousted by the quo warranto, there ought not to have been a new election, but that *Cundall* was entitled to be councillor, and might claim to be admitted. If any difficulty was made about admitting him, he might have applied for a mandamus to admit him, and he would have had it: but the mandamus would go on the ground that he had a right to be admitted, and that a new election was not required. Then sect. 51 prescribes the manner in which a person shall accept the office and be admitted to it; *Cundall* did so accept the office on 8th *November* 1852; and I think from that time it is clear that, subject to the other point, viz. whether he did so in time, he was councillor and entitled to act. As to the other point, I agree with my Lord on both grounds: that the enactment requiring the party to accept within five days after notice does not apply to such a case; and that the special verdict does not shew that *Cundall* had five days' notice.

Judgment for the Crown.

(a) *Coleridge* J. had gone to Chambers. No fourth Judge sat on this day.

1854.

Monday,
January 23d.

CHARLOTTE CATHERINE HEATH, administratrix,
against MATTHEW SMITH.

To a declaration for infringement of a patent, the defendant pleaded that the invention was not new, but had been publicly and generally practised and used in *England* before the date of the patent.

It was proved that, before the date of the patent, five different persons had used the process independently, three of them without concealment, and all five had publicly and generally sold, for their own profit, the article thereby produced. It did not appear that there had been any other publication of the invention. Held that, upon this evidence, the plea was proved.

Seemle, per *Erie J.*, that the plea would have been proved by evidence that, before the date of the patent, any one person had, for his own profit, produced the article by the process, and sold it publicly and generally, though he had used the process secretly, and concealed its nature.

COUNT by plaintiff, as administratrix of *Josiah Marshall Heath*, stating that the intestate was the inventor of a new manufacture, that is to say of certain improvements in the manufacture of iron and steel; and that the Queen, by letters patent, duly sealed &c., granted to him, his executors, administrators and assigns, the sole privilege to make, use, exercise and vend the invention within *England*, for fourteen years, from 5th *April* 1839, subject to the condition of inrolling a specification within six calendar months, which the intestate fulfilled: and that defendant infringed the patent during the term.

Plea 1. Not guilty. Issue thereon.

The only other plea material to the point now decided was:

4. That the invention was not, at the time of the making and granting of the letters patent, a new invention, but, on the contrary thereof, had been, wholly and in part, publicly and generally practised, used and vended in *England*, and in divers places therein, on divers days and times before the date and grant of the letters patent: by reason whereof the rights, liberties,

privileges, benefits, monopolies and advantages by the letters patent granted, and the prohibitions therein contained, were, at the time of the granting of the letters patent, and at all times, wholly void; and the same were at all times wholly lost and forfeited to and by the said *J. M. Heath*. The plaintiff took issue upon this.

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On the trial, before *Erle J.*, at the last *Liverpool Assizes*, it appeared that the intestate, by his specification, declared the nature of his inventions to be :

“First, the extraction of pure cast-iron from certain ores of that metal, without the intervention of any earthy alkaline or saline matter to form a vitreous flux, cinder or slag; secondly, the formation of cast-steel, by fusing the said pure cast-iron along with malleable iron, or certain metallic oxides, in such proportion as may decarburate the cast-iron to a certain degree, and by completing the decarburation in a suitable cementing furnace; thirdly, the use of a certain portion of oxide of manganese in the process of converting cast-iron into malleable iron by the process of puddling; and, fourthly, the use of carburet of manganese in any process whereby iron is converted into cast-steel.” The specification then detailed the processes to be used for carrying into effect certain parts of the invention, not material to the question which came ultimately before the Court; and stated as follows: “Lastly, I propose to make an improved quality of cast-steel, by introducing into a crucible bars of common blistered steel (*a*) (broken as usual into fragments), or mixtures of cast and malleable iron, or malleable iron and carbonaceous matter, along with from one to three per cent. of their weight of carburet

(*a*) Called also bar-steel. It is produced by heating iron in contact with carbonaceous matter, such as powdered charcoal.

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of manganese, and exposing the crucible to the proper heat for melting the materials, which are when fluid to be poured into an ingot-mould in the usual manner; but I do not claim the use of any such mixture of cast and malleable iron, or malleable iron and carbonaceous matter, as any part of my invention, but only the use of the carburet of manganese, in any process for the conversion of iron into cast-steel." Then followed the statement of claim, divided into four heads, of which the first three are not here material: the fourth and last was: "and, fourthly, the employment of carburet of manganese in preparing an improved cast-steel."

By the evidence it appeared that, before the taking out of the patent, it had been known that cast-steel, of improved quality, would be formed by the use of the oxide of manganese: but that a difficulty in employing this arose from the destruction of the crucible (*a*) in which the steel was melted, the manganese breaking the crucible by combining with its carbonaceous matter, so that the charge of steel was lost. In the patented process this inconvenience was obviated. The result of this was that a quality of cast-steel, which previously could be obtained only from superior foreign iron or steel, could be formed from *English* iron ore. The case for the plaintiff, as to the infringement, was, that the defendant, though he had not used carburet of manganese ready prepared, had formed a flux by putting into the crucible, along with the blistered steel, black oxide of manganese together with carbonaceous matter (coal tar); and that the oxide of manganese entered into union with the carbon at a temperature lower than that necessary for melting the

(*a*) Formed principally of Stourbridge clay and some carbonaceous matter, as powdered coke.

steel, so that, before the steel was melted, a carburet of manganese was formed in the crucible: the consequence of which was that, when the temperature was elevated sufficiently to melt the steel, the carburet of manganese, already formed in the crucible, melted at the same time, or before, and entered into alloy with the steel, as the latter melted, so as to produce the same effect as the patented process, and upon the same principle. Evidence was given that the plaintiff discovered this mode of making the carburet in the pot with the steel, after the grant of the letters patent, and had communicated it to the public. For the purpose of the trial, it was assumed that what the defendant had done was an infringement of the patent (a).

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The defence was that the same process had been used before the patent was granted. Evidence was given that five different firms had practised the process before the grant: it appeared that two of these firms had conducted it with precautions for preventing it from becoming known; but that, in the case of the other three, no concealment had been attempted, the process being known to all such workmen as were successively employed by the firms, and no injunctions having been imposed as to secrecy. The five firms had all publicly and generally sold the steel produced for their own profit. Except as above, the process had not been made public before the grant of the patent.

The learned Judge expressed his opinion that, if this evidence was believed, the invention was not new: and,

(a) See *Heath v. Unwin*, in Exch. Ch., 12 Com. B. 522, overruling *Heath v. Unwin*, in Exch., 13 M. & W. 583. And see *Heath v. Unwin*, 16 Sim. 552. The evidence set out in the bill of exceptions (12 Com. B. 529 *et seq.*) contains full details as to the process.

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the counsel for the plaintiff admitting that the truth of the evidence could not be disputed, his Lordship directed a verdict for the defendant on the issue on the fourth plea, and for the plaintiff on all the others.

In *Michaelmas* Term, Sir *A. J. E. Cockburn* obtained a rule *Nisi* for a new trial on the ground of misdirection.

Sir *Fitzroy Kelly*, *T. Jones* and *Deighton* shewed cause (a). The question is, whether an invention be new when the process has been used, without concealment, by manufacturers, for their own profit, but not formally published to the world. By sect. 6 of stat. 21 *Ja.* 1. c. 3. the monopoly is given only "to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use." Nothing is there said as to the publicity or generality of the user. [Lord *Campbell* C. J. If a party by his own experiments completes a discovery, and uses it, can he, unless within a reasonable time, obtain a valid patent?] It seems that he cannot: were it otherwise, a monopoly might practically be obtained for more than the fourteen years. But can any other person, who subsequently makes the discovery, have a patent under these circumstances? [Lord *Campbell* C. J. And against the earlier inventor?] That is what the plaintiff must assert. The infringement here complained of was the use of carbon and manganese with the steel, in such manner as to produce carburet

(a) The argument was commenced on an earlier day in this term (*January* 19th), before Lord *Campbell* C. J., *Wightman* and *Erle* Js., and was resumed on this day, before the same Judges. *Coleridge* J. was also present in Court on this day, but, not having heard the whole argument, took no part in the decision.

of manganese in the process, the patent being for the application of carburet of manganese to steel. Assuming that to be an infringement of the patent, it follows that any one using the same process had anticipated the patent: and it was shewn that five firms had done so, of which at least three had done it without any kind of concealment. It is true that, where the previous alleged user turns out to have been merely experimental, that is not a previous user sufficient to vitiate the patent. But, if the discovery has been actually used in trade, the patentee cannot be the first inventor; *Tennant's Case* (a), where the party previously using the method had kept it secret from all but his two partners and two servants concerned in preparing it; *Carpenter v. Smith* (b), where Lord Abinger distinguished from the case of mere experiments, and added: "The 'public use and exercise' of an invention means a use and exercise *in public*, not *by the public*." In *Morgan v. Seaward* (c), which may be cited on the other side, there was, so far as regarded this realm, no more than a secret experiment, or at any rate a secret construction of the article, though with a view to user abroad; and the actual user took place after the date of the plaintiff's patent. There the Court said: "It must be admitted that if the patentee himself had before his patent constructed machines for sale, as an article of commerce, for gain to himself, and been in the practice of selling them publicly, that is, to any one of the public who would buy, the invention would not be new at the date of the patent." "But we do not think that the patent is vacated on the ground of the want of novelty

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(a) Abstracted in *Davies's Collection of the most important cases respecting Patents of Invention*, 429.

(b) 9 M. & W. 300: S. C. at N. P., 1 Webster's Pat. Ca. 530; see p. 534.

(c) 2 M. & W. 544.

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and the previous public use or exercise of it, by a single instance of a transaction such as this," "which is not like the case of a sale to any individual of the public who might wish to buy; in which it does not appear that the patentee" (who was there himself the party supposed to have previously used) "has sold the article, or is to derive any profit from the construction of his machine." The judgment, thus explained, is in favour of the present defendant. *Cornish v. Keene* (a) will also be referred to, for the plaintiff. There *Tindal* C. J., in summing up, put, as a test of the novelty, "if it was known at all to the world publickly and practised openly, so that any other person might have the means of acquiring the knowledge of it, as well as this person who obtained the patent—then the letters patent are void; on the other hand, if it were not known and used at the time in *England*, then as far as this question is concerned the letters patent will stand." But what he meant by public practice appears by the language used immediately afterwards: "A man may make experiments in his own closet for the purpose of improving any art or manufacture in public use; if he makes these experiments and never communicates them to the world, and lays them by as forgotten things, another person, who has made the same experiments, or has gone a little further, or is satisfied with the experiments, may take out a patent, and protect himself in the privilege of the sole making of the article for fourteen years; and it will be no answer to him to say that another person before him made the same experiments, and therefore that he was not the first discoverer of it—because there may be many discoverers starting at the same time, many rivals that may be

(a) 1 *Webster's Pat. Ca.* 501, 508; S. C. in banc; (not S. P.) 3 *New Ca.* 570.

running on the same road at the same time, and the first which comes to the Crown and takes out a patent, it not being generally known to the public, is the man who has a right to clothe himself with the authority of the patent, and enjoy its benefits." The distinction is not between user of a method for the purposes of the trade of the party using and public announcement of the method, but between an experiment not reduced to practice and actual practice. [Lord *Campbell* C. J. When I was attorney general, and it appeared that there were two contemporaneous discoverers, I used to give a patent to the two jointly. Sir *A. J. E. Cockburn*, Attorney General, stated that he had adopted the same practice, but had found parties ordinarily unwilling to accept patents on such terms.] No doubt there would be much hardship if a patent were defeated by proof of an earlier experiment which had been abandoned: but that is not the case here. A fair criterion of the rights of these parties is this: Would the plaintiff be able to sue any party for now doing what that same party had done lawfully before the patent? In *Cornish v. Keene* (a) *Tindal* C. J. says: "if the defendants have shewn that they practised it and produced the same result in their factory before the time the patent was obtained, they cannot be prevented by the subsequent patent from going on with that which they have done." The Judge in the present case had really nothing to leave to the jury: if he had asked them to say whether there had been a public user, he must have defined to them a public user; and that would have brought him to the words of the statute; which would, in effect, have been directing them to find for the defendant, the evidence not being

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(a) 1 *Webster's Pat. Ca.* 511.

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impeached. A decision for the plaintiff would reintroduce the very evil which stat. 21 *Ja.* 1. c. 3., as is known from history and as appears by the preamble, was intended to prevent; for it would confer a power of granting a monopoly against parties already in the enjoyment of the trade. The patent laws, no doubt, have in view the publication of discoveries: but this they require as the consideration for the enjoyment of a monopoly, not as a condition for putting in practice a discovery of which others, if they can, may also avail themselves; which is all that the parties previously practising have here done. In *The Househill Company v. Neilson* (a) Lord *Lyndhurst* C. said: "If the invention is in use at the time that the grant is granted, the man cannot have a patent, although he is the original inventor." The Court of Common Pleas relied upon this language in *Stead v. Williams* (b).

Sir *A. J. E. Cockburn*, Attorney General, and *T. Webster*, contra. The use which is to invalidate a subsequent patent must be more than use for the mere purpose of the party using: it must be, in some sense of the word, public. [Lord *Campbell* C. J. Is not that judge-made law? Must we not look at the language of the statute?] Of the statute as judicially expounded. It is important to distinguish between two sorts of inventions: in one, the article itself, on being inspected, discloses the nature of the invention; in the other, the article shews nothing but the result produced. [Lord *Campbell* C. J. The lock, in *Carpenter*

(a) In Dom. Proc.; 1 *Webster's Pat. Ca.* 673. 719; *S. C.* 9 *Cl. & F.* 788; see p. 807.

(b) 7 *M. & G.* 818. 842.

v. *Smith* (a), you would probably instance as a case of the former sort.] It is so: chemical inventions are of the latter sort: and, of these, some are such that analysis will detect the method, as where the peculiarity is merely as to the simple substance used; some, as where the mode of treating or obtaining such substances constitutes the invention, are beyond the reach of analysis. The general sale of articles produced by processes of the second kind will not furnish the public with the means of becoming acquainted with the nature of the invention. The present case obviously is one of the latter sort of inventions. Neither is an open use of the process in a private manufactory a disclosure of it to the public. The patent laws have in view two objects: first, to stimulate invention; secondly, to secure to the public the knowledge of the invention. [Lord *Campbell* C. J. Thirdly, to protect persons in trade from being interfered with by a monopoly.] The policy is to be inferred from a view of the balance of advantage and disadvantage. The patentee here has promoted the policy in all respects: the earlier practisers of the invention have attended merely to their own interests. Their user no more prevents the present patent from being valid than Dr. *Hall*'s invention invalidated *Dollond*'s patent (b). *Morgan v. Seaward* (c) is a similar case. Here five firms appear as independent

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(a) 9 M. & W. 300; S. C. at N. P., 1 *Webster's Pat. Ca.* 530.

(b) "The objection to *Dollond*'s patent was, that he was not the inventor of the new method of making object glasses, but that Dr. *Hall* had made the same discovery before him. But it was holden, that as Dr. *Hall* had confined it to his closet, and the public were not acquainted with it, *Dollond* was to be considered as the inventor of it." Per *Buller* J., in *Boulton v. Bull*, 2 H. Bl. 463. 470.

(c) 2 M. & W. 544.

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discoverers: the case would be different if they all obtained their knowledge from a common source, for then that common source would be public: but each conceals from the public. [Lord *Campbell* C. J. As to three of the firms, there is no concealment beyond the fact of no positive steps being taken to produce publicity.] The effect is the same. The plaintiff was an inventor; and he is the first inventor who published. The case falls within the principle of *Jones v. Pearce* (a), *Lewis v. Marling* (b) and *Morgan v. Seaward* (c). It is not necessary to inquire whether the parties who actually practised this invention before might specially plead the fact: that may possibly result from the doctrine intimated in the dictum cited from *Cornish v. Keene* (d). Here the question is what protection such prior user gives to a third party who does not use till after the publication made by the patent. The monopoly is a reward for the publication. "The reason wherefore such a privilege is good in law is, because the inventor bringeth to and for the common wealth a new manufacture by his invention, cost and charges, and therefore it is reason, that he should have a privilege for his reward (and the encouragement of others in the like) for a convenient time." 3 *Inst.* 184 (e). The publication was at first provided for by introducing specific clauses into the grant, as in the case of *Buck's* invention (g), in which the private Act granting the monopoly requires the grantee to take and teach apprentices. This object has, since the time of the eleventh year of Queen

(a) 1 *Webster's Pat. Ca.* 122.(b) 10 *B. & C.* 22.(c) 2 *M. & W.* 544.(d) 1 *Webster's Pat. Ca.* 511.(e) See *Darcy v. Allin, Noy*, 173. 182.(g) Act of the Commonwealth Parliament, 1651, c. 2. See *Scobell's Collection*, p. 153; 1 *Webster's Pat. Ca.* 35.

Anne, been provided for by a clause in the grant, requiring the enrolment of a specification (a). The use of carbon and manganese in the manufacture of steel were well known: but the difficulty lay in the mode of using them so as not to destroy the vessel: and the discovery consisted in the use of carburet of manganese, by means of which there was introduced such a quantity of carbon as would protect the vessel. The process used by the defendant itself produced carburet of manganese, and was an infringement. If the previous user stopped at mere experiment, it is clear that the patent could not be thereby vitiated; *Galloway v. Bleaden* (b). The novelty of the patented invention depends upon the novelty of the invention as a whole; *Newton v. Grand Junction Railway Company* (c): the question is not as to the novelty of any particular part, though an infringement may be as to a part only. [Lord Campbell C. J. Yes, if that part be new.] Then, though there might have been a previous user of the combination of carburet of manganese with steel, the Judge ought to have asked the jury whether the evidence shewed that there had been an earlier use, except in the course of mere experiment, of the whole invention, as patented. If there had not, those who had used the particular part might defend themselves against an action for the infringement by shewing that they had so used before the patent, howsoever secretly; but that would not, as between the patentee and others, destroy the novelty of the invention

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(a) See 1 *Webster's Pat. Ca.* p. 8. The practice is recognised by stats. 5 & 6 W. 4. c. 83., 15 & 16 Vict. c. 83.

(b) 1 *Webster's Pat. Ca.* 521. 525.

(c) 5 *Exch.* 331. See *Smith v. London and North Western Railway Company*, 2 *E. & B.* 69.

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as a whole so as to invalidate the patent. *Tennant's Case* (a) (which was recognised in *Hill v. Thompson* (b)) is relied upon on the other side; but, when that case is compared with *Cornish v. Keene* (c) and *Dollond's Case* (d), it appears that a party, who has not himself used an invention before the patent, cannot assert that a patent is void on the ground of a previous secret use by others. A fuller report of *Tennant's Case* than that given by *Davies* was published about the time (e); and from that it appears that *Tennant* learned the method from another party, and that the method had been practised by several persons. In *Wood v. Zimmer* (g) *Gibbs* C. J. left it to the jury "whether the invention was in public sale before the patent." *Carpenter v. Smith* (h) is cited: but from the report of the trial (i) it appears that the invention was, before the patent, publicly known, and the article made by several distinct parties. In *Househill Coal and Iron Company* (k) Lord *Campbell* insists upon the "prior use publicly known;" and Lord *Lyndhurst* C. (l) carefully excludes the supposition that the House of Lords had "given any decision upon this state of facts, namely, if an invention had been formerly used and abandoned many years ago, and the whole thing had been lost sight of." In *Stead v. Williams* (m) the principle laid down was that the public "cannot be

(a) *Davies's Collection* &c. 429.(b) 8 *Taunt.* 375.(c) 1 *Webster's Pat. Ca.* 501.(d) 2 *H. Bl.* 470.(e) "Proceedings in a Suit in Chancery, and the Trial of a Cause instituted in the Court of King's Bench," "in the name of Mr. Charles Tennant," "against Messrs. James Slater," &c. *Manchester*, 1803.(g) *Holt's N. P. C.* 53.(h) 9 *M. & W.* 300.(i) *Carpenter v. Smith*, 1 *Webster's Pat. Ca.* 530.(k) 9 *Cl. & F.* 814.(l) 9 *Cl. & F.* 816.(m) 7 *M. & G.* 843.

precluded from the right of using such information as they were already possessed of, at the time of the patent granted;" and that the proper question was whether "there had been such a publication as to make the description a part of the public stock of information." In the case of *Soames's Patent* (a), before the Privy Council, Lord Campbell said: "when sitting in a Court of justice, and considering the validity of the patent, I should require that it should be known in *England*." [Lord Campbell C. J. Our law in that respect differs from that of some other countries, where the publication out of the realm is understood to destroy the novelty: and I, as a legislator, was anxious that the law should be so in *England*: but a different view prevailed.] It is understood that in *America* stronger evidence of publicity is continually required. The principle for which the defendant here contends would have the effect of destroying the novelty of a patent if a single manuscript could be found in a private library describing the invention.

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Lord CAMPBELL C. J. I am of opinion that this rule should be discharged. We must assume that the evidence for the defendant is true: and it seems to me that, giving credit to it, the patent is invalid. We are not so much to attend to the particular words of the plea, as to consider whether the patent can be maintained in conformity with stat. 21 *Ja.* 1. c. 3. s. 6., and the decisions that have been pronounced upon that statute. I am of opinion here that, if the jury had found for the plaintiff on this plea, the verdict could not have

(a) 1 *Webster's Pat. Ca.* 729. 733.

1854. been supported. We must now assume that, before the
HEATH date of the patent, there were at least five firms using
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 specification of the patent. That process, according to
 the decision of the Exchequer Chamber in *Heath v.*
 Unwin (a), consisted in making steel by applying a
 combination of carbon and manganese producing car-
 buret of manganese: and it is clear that these five firms
 had all manufactured the steel by putting into a crucible
 iron, manganese and carbon, and thus making carburet
 of manganese. This was not a mere experiment: a
 perfect manufactured article was produced for profit, by
 hundreds of tons. As to two of these firms, it appeared
 that they did not disclose the nature of the method: but
 the other three firms made no attempt at concealment,
 but carried on the trade just like any other handicraft
 by which bread was to be earned; all the workmen and
 other persons successively employed knew of the method.
 That being so, the question is whether, under these cir-
 cumstances, the patent can be supported. Now look at
 the statute, the passing of which, we all know, was a great
 achievement on behalf of the liberty of the subject, as
 it put an end to the mischief of monopolies, and enabled
 persons who had been earning their bread to continue
 to do so by the same means, without a liability to legal
 proceedings. The statute, when it put an end to the
 monopoly, reserved the power of granting letters patent
 for "new manufactures," with these most important
 words, "which others at the time of making such letters
 patents and grants shall not use." Now can it be said
 that at the time when this patent was granted others did

(a) 12 Com. B. 522.

not use this manufacture? The five firms all did use it, in the way of trade, earning their bread by it. Can it be said that in that state of things the Crown was authorized to grant this patent? We might as well revive Sir *Giles Mompesson's* patent, and all the other monopolies which reflected so much discredit on the policy of this country. But it is said that, according to judicial determinations, the user must be public. If we are to make this addition to the statute, has there not been a public user within the meaning of the words? Can a patent be granted for a manufacture which other people have used, not indeed in the market place, but without any concealment whatever? If this user without concealment does not constitute a public use, what does? Then, as to the decisions. In *Jones v. Pearce* (a) there was a mere experiment: in *Lewis v. Marling* (b) a model and specification had been shewn; but no machine used: in *Morgan v. Seaward* (c) the machine was privately made to be sent abroad. Does any one of these cases approach the present, where, during several years, the manufacture has been carried on for the purpose of trade, and the article sold to the public? Therefore I think this patent void, as being contrary to the condition on which patents are granted, there being no authority to support it, and *Carpenter v. Smith* (d), with other decisions, being adverse to it. Then what purpose could be served by the Attorney General going to the jury on anything but the credit of the witnesses? No doubt, if, as in *Jones v. Pearce* (a), there had been anything in the evidence indicating that the user was a mere experiment, that might have been put to the jury:

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(a) 1 *Webster's Pat. Ca.* 122.(b) 10 *B. & C.* 22.(c) 2 *M. & W.* 544.(d) 9 *M. & W.* 300.

1854. that question I generally leave to them. But here the evidence was all one way; and, if the witnesses were believed, the jury were bound to say that there had been a previous user, and not an abandoned experiment as in *Jones v. Pearce* (a). Looking, therefore, at the evidence, the statute, and the authorities, I think the jury were bound to find for the defendant; and that the verdict cannot be set aside.

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ERLE J. (b). I also am of opinion that this rule should be discharged. The steel, as I understood, was manufactured by the defendant from carbon, manganese and iron: and, it having been discovered that the combination of these will produce carburet of manganese, it was held in the Exchequer Chamber (c), and I held at the trial, that the patent comprehended all use of carbon, manganese and iron. Upon that point, the question for the opinion of the jury may be, whether the melting these in combination produced carburet of manganese: the plaintiff as patentee did not rely upon any given proportions. Then the evidence as to the question of novelty I may take to be, that five extensive firms had used the method for profit, some to the extent of one hundred tons yearly, some to the extent of eight or ten; and I must be taken to have laid down the law, that, if there was such user before the patent was taken out, the patented invention could not be novel. By that, as at present advised, I still abide. The notion of these being mere experiments is completely contrary to the evidence: and the parties produced the article in as

(a) 1 *Webster's Pat. Ca.* 122.

(b) *Wightman J.* had left the Court during the argument.

(c) *Heath v. Unwin*, 12 *Com. B.* 522.

perfect a state as the patenting process itself did. As to secrecy, three of the firms practised no concealment whatever. That of itself is ground enough for discharging the rule. I should, however, be disposed to go further. If one party only had used the process, and had brought out the article for profit, and kept the method entirely secret, I am not prepared to say that then the patent would have been valid. But, for the purpose of the present case, it is enough to say that here was an user without any concealment.

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Lord CAMPBELL C. J. added : I wish it to be clearly understood that, if we had held this patent valid, the five firms would all have been liable to an action for exercising the invention after the patent had been taken out. Nothing in the statute gives an exception in such a case. So that, if we had held a person entitled to a patent for the discovery of a process openly practised by others for their own profit, but without a public announcement of the method, the action would lie against them : there is no ground for contending that there is anything exempting such parties from liability. Now see what that comes to. If any man makes a discovery, and uses it without taking out a patent, and does not announce it by sound of trumpet or calling in the public as spectators, he must suspend the use of his discovery if another person subsequently makes the same discovery and takes out a patent for it. That would be the consequence of the principle for which the defendant is driven to contend.

Rule discharged.

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Tuesday,
January 24th.

JOHN STANTON *against* FREDERICK COLLIER and
HENRY COLLIER.

Count by a printer for not restoring a printing machine according to contract, whereby the trade of plaintiff had been ruined, and he had become insolvent. Plea; that, after the accruing of the causes of action, plaintiff took the benefit of the Insolvent Debtors' Act, and the causes of action vested in the provisional assignee. Demurrer; and further replication, that the assignee had not intervened; on which was a rejoinder, and a demurrer to the rejoinder.

Held: that stat. 15 & 16 Vict. c. 76. s. 142. does not apply to actions commenced after the insolvency of the plaintiff;

and that the non-interference of the assignees is immaterial where the cause of action accrues before the insolvency: and therefore the replication was not an answer to the plea.

Held, also, that the cause of action disclosed on this count, and the special damage there alleged, were wholly injury to the estate of the plaintiff, and not personal damage; and, consequently, that the whole cause of action passed to the assignee, and the plea was good.

COUNT. That plaintiff carried on the trade of a printer: that, the sheriff having seised goods of the now plaintiff under a fi. fa., issued on a judgment against him at the suit of the now defendants, it was agreed between plaintiff and defendants that the sheriff should withdraw; that defendants should advance to plaintiff 50*l.*; that defendants should at their own expense take down and remove to their own premises a printing machine of plaintiff by way of security; and that, if, within fourteen days, plaintiff redeemed it by paying the advances, defendants should at their own expense put it up again on plaintiff's premises. Averment: that plaintiff within the fourteen days tendered the money. Breach: that defendants refused to accept the money or replace the machine: "Whereby the plaintiff not only lost and was deprived of great gains and profits which otherwise would have accrued to him by the use of the said printing machine in the way of his said trade or business, but also, by reason of the premises, the whole business and trade of the plaintiff hath been ruined, injured and stopped, and the plaintiff hath thereby become insolvent, and incurred very heavy costs and expenses."

Plea. That, after the accruing of the causes of action, plaintiff, being in actual custody, petitioned the Court for the Relief of Insolvent Debtors; and that, by a vesting order made by them, the causes of action vested in the provisional assignee.

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Demurrer. Joinder.

Second replication to this plea: That the assignee has not interfered to claim the causes of action, or to prevent the plaintiff from suing for them.

Rejoinder: That the causes of action were wholly before plaintiff's petition; that plaintiff filed a schedule, and was discharged as to the debts named in it, which are not yet satisfied.

Demurrer. Joinder.

Wordsworth, for the plaintiff. The plea is bad, as it does not shew that the defendants have complied with the provisions of the Common Law Procedure Act (15 & 16 Vict. c. 76.) s. 142. [*Coleridge J.* The sections, from 135 to 142 inclusively, are confined to the effect of death, marriage or bankruptcy on the proceedings in an action already commenced when the event happens.]

The plea ought to shew that the assignees have interfered to claim the cause of action; *Herbert v. Sayer* (a), *Jackson v. Burnham* (b). [*Lord Campbell C. J.* The doctrine acted on in these cases is applicable where the cause of action is one arising from dealings with the bankrupt or insolvent after the bankruptcy or insolvency. But, unless you can say something to change our opinion, we think that, when the

(a) 5 Q. B. 965.

(b) 8 Exch. 173.

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cause of action was already vested in the debtor at the time when by the order his property passed to the assignee, interference on the part of the assignees is wholly immaterial.]

The cause of action is not one which passes to the assignees at all. The principal damage is plaintiff's insolvency, a matter injurious to his personal feelings, and for which a jury might properly give vindictive damages. Such a cause of action does not pass: this was assumed in *Beckham v. Drake* (a), and decided in *Rogers v. Spence* (b). [Lord Campbell C. J. The distinction between the cases in which the cause of action passes to the assignees and those in which it does not is analogous to the question considered in *Blake v. Midland Railway Company* (c). A solatium for the injury done to the personal feelings of a debtor does not pass to his assignees; damages for the injury to his property do. Coleridge J. But in this case the breach is for not delivering property, so that the cause of action itself might be sued for by the assignees. And the assignees might, for aught I at present see, lay the special damage in precisely the same terms as is now done by the plaintiff; for it all points to a pecuniary loss.] The jury might give vindictive damages for the insolvency; that is the test laid down in *Brewer v. Dew* (d), the decision in which case goes further than the plaintiff now requires.

(a) 2 H. L. Ca. 579, affirming the judgment of Exchequer Chamber in *Drake v. Beckham*, 11 M. & W. 315, which reversed the judgment of the Exchequer in *Beckham v. Drake*, 8 M. & W. 846.

(b) 12 Cl. & F. 700, affirming the judgment of the Exchequer Chamber in *Rogers v. Spence*, 13 M. & W. 571, which affirmed the judgment of the Exchequer in *Spence v. Rogers*, 11 M. & W. 191.

(c) In Q. B.; Feb. 21, 1852.

(d) 11 M. & W. 625.

H. Bullar, contrà, was desired by the Court to confine himself to the point last made. The whole law on this subject was elaborately considered by the House of Lords in *Rogers v. Spence* (a) and *Beckham v. Drake* (b), in which latter case all the prior authorities were collected and reviewed. In a more recent case, *Wetherell v. Julius* (c), the Court of Common Pleas, after time taken to consider, stated the principles to be deduced from these cases. They say: "In the former" (*Rogers v. Spence* (a)), "it was held, that a cause of action arising out of a wrong personal to the insolvent, and for which he would be entitled to a remedy, whether his property were diminished or impaired or not, does not pass to the assignee." "On the other hand, in *Beckham v. Drake* (b), it was held, that, where pecuniary loss or damage is the substantial and primary cause of action, it does pass to the assignee, although such pecuniary loss may produce inconvenience to the party." Now in the present case there is but one cause of action, the non-delivery of the printing machine: no fresh cause of action would accrue on the happening of the special damage; *Howell v. Young* (d). That cause of action is as much a damage to the personal estate as the dishonouring of a bill of exchange; and an action for dishonouring a bill passes to the assignees; *Hill v. Smith* (e). The special damage to the plaintiff's trade is entirely a pecuniary damage: and, as to the insolvency, that is in general a grievous pecuniary damage. It is said that it is also a personal inconvenience to the plaintiff. Even if a solatium for that could be recovered, still the substantial cause of action is pecuniary; which brings this

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COLLIER.(a) 12 *Cl. & F.* 700.(b) 2 *H. L. Ca.* 579.(c) 10 *Com. B.* 267. 280.(d) 5 *B. & C.* 259.(e) 12 *M. & W.* 618.

1854. case within *Beckham v. Drake* (a) as expounded in
 STANTON *Wetherell v. Julius* (b). But no damage can be reco-
 V. vered for the insolvency. In one sense, every thing
 COLLIER. which has diminished the plaintiff's property may be
 said to have caused his insolvency; but the damages
 recoverable for a breach of contract are only those
 directly connected with the contract. In *Pothier, Traité
 des Obligations, Partie 1. Cap. 2. Art. 3.* sects. 159 to
 162 (c), the principle is very clearly explained. The
 person, he says, who has broken a contract must make
 good to the other side the loss which the non-per-
 formance has occasioned, and the profit which he
 would have made; according to the definition of
 damages in the *Digest, Lib. 46. Tit. 8. Ratam rem
 haberi: Law 13.* In tantum competit, in quantum
 meâ interfuit; id est, quantum mihi abest, quantumque
 lucrari potui. But this, *Pothier* says, is not to be under-
 stood as making the party in default bound to make
 good, indiscriminately, every loss occasioned by the non-
 performance of the contract, still less all gains which
 might have been made, had the contract been fulfilled;
 but only those so connected with the contract that the
 parties, when making the contract, may be supposed
 to have contemplated them: and in general, he says,
 the parties must be taken to contemplate those con-
 sequential damages which relate to the subject matter
 of the contract itself, not the collateral effect on
 other property of the party injured. Therefore the
 civil law makes the defaulting party liable only for
 those damages which relate to the subject matter

(a) 2 H. L. Ca. 579.

(b) 10 Com. B. 267.

(c) Œuvres, tom. 1. p. 67 (2nde ed. 1781.). See the *French Code Civil*, ss. 1149, 1150, and *Rogron's Comment, Codes Français Expliqués*, Vol I. p. 212.

of the contract: *damni et interesse, propter ipsam rem non habitam*. *Pothier* puts two instances. If a party contract to supply a horse and make default, he is liable to make good the higher price which the purchaser has to give in order to procure another; for that was, *propter ipsam rem non habitam*, a kind of damage which the parties must have contemplated. But, says *Pothier*, if the purchaser were a canon, who for want of a horse was unable to reach his benefice in time and so lost his year's revenue, the defaulter should not be bound to make good this collateral damage; unless, as he afterwards qualifies it, there was in the contract a clause that the horse was to be supplied in time to enable the purchaser to reach his benefice; for in that latter case the damage would be such as the parties contemplated. Or, if a house be let for eighteen years, and after eight years the tenant is evicted, the landlord must make good the tenant's expense in removing, and the extra rent which he has to pay in order to get as good a house for the rest of the term; but he is not bound to make good the loss of the goodwill of a trade which the tenant may have raised in the house, unless, as in the last case, the house had been expressly let as a shop in which to carry on that business. Still less should he compensate him for damage done to his goods by the negligence of those removing them. In *Sedgwick On Damages*, chap. 3., the whole of the subject is discussed and the authorities are collected. The learned author comes, at p. 112 (2d ed.), to the conclusion that, in cases of breach of contract, "The rule of the civil law is perhaps the best that can be adopted; that the party in default shall be held liable for all loss that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into."

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1854. Now, in this case, the damage sustained by not being
STANTON able to use the machine may be recoverable; for that is
V. proper rem non habitam; but that is a damage for
COLLIER. which the assignees may sue. The insolvency of the
plaintiff, and still more the injury to his feelings arising
from that insolvency, is too remote. The parties cannot
have contemplated that consequence when they made
the contract. Lastly, supposing that the plaintiff was
entitled to sue for part of the damage, whilst the assignees
are entitled to sue for the rest, the judgment ought not
to be for the plaintiff on the ground that the plea is bad
as to part and therefore bad in the whole, as used to be
the law. But the judgment, now, should be according
to the very right of the cause, treating the plea as
divisible; according to sects. 50 and 75 of the Common
Law Procedure Act.

Wordsworth, in reply. *Brewer v. Dew* (a) has not
been distinguished from the present case.

LORD CAMPBELL C. J. I am of opinion that the
defendants are entitled to judgment. In the course of
the argument we intimated a clear opinion that sect. 142
of the Common Law Procedure Act does not apply.
Neither is there any objection to the plea, on the ground
that it is not shewn that the assignees have interfered
and claimed the cause of action. The cases to which
the doctrine alluded to is applicable are those in which
the cause of action relates to property acquired after the
insolvency. In the present case the property was in
the plaintiff before the vesting order, by virtue of which
all property then vested in him was transferred to his

(a) 11 M. & W. 625.

assignees; and, from that time, he could have no cause of action in respect of such property. But then comes the question, whether the cause of action disclosed on this record is such as would pass to the assignees. As to that, the rule to be deduced from *Rogers v. Spence* (a) and *Beckham v. Drake* (b) is that, where the cause of action and damage touch only the person of the debtor, they do not pass to the assignees; but, if they touch the personal estate, they do. Now, in the present case, the printing press had become, at the time the action commenced, the property of the assignees; the breach for not delivering it touches that property, and would be well assigned in an action by the assignees. The question therefore is confined to the effect of the special damage. Now, even supposing that, if a part of the special damage was personal, so much of the cause of action would not pass to the assignees; I am of opinion that the whole of the special damage here alleged, supposing it all to be recoverable, is substantially damage to the personal estate, and there is no part which touches only the person. As my brother *Coleridge* said during the argument, I do not see why the assignees might not lay special damage in these terms as much as the plaintiff. It would have been quite a different thing if anything had been alleged confined entirely to the person, as in *Wetherell v. Julius* (c), where the damage, in the first count, was the imprisonment of the plaintiff.

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COLERIDGE J. I am of the same opinion. There is but one cause of action here; the non-delivery of the printing press according to the contract. That would

(a) 12 Cl. & F. 700.

(b) 2 H. L. Cu. 579.

(c) 10 Com. B. 267.

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entitle the plaintiff, if he had not become an insolvent, to recover damages for his pecuniary loss; and, if there was nothing shewn to alter the case, the measure of those damages would be the value of the article. But here special damage is alleged. I do not think it necessary to consider whether the damage laid can be recovered or is too remote; for I agree with my Lord, that, supposing it could all be recovered to the full extent laid, every thing here alleged is pecuniary damage affecting the estate.

WIGHTMAN J. It is clear that, where the action is for a cause happening before the bankruptcy or insolvency, it is not necessary, for the party pleading the bankruptcy or insolvency, to shew that the assignees have interfered. As to the other point, the rule is clear, that *primâ facie* all causes of action relating in any way to the personal estate pass to the assignees; but that is subject to an exception where the personal estate is injured only through the injury to the person or personal feelings of the debtor. In the present case, the breach is for not delivering a printing press, a cause of action which would clearly pass. The special damage is averred to be that the plaintiff lost the "gains and profits which otherwise would have accrued to him by the use of the said printing machine," and his whole business has been "ruined, injured and stopped, and the plaintiff hath thereby become insolvent, and incurred very heavy costs and expences." All this goes to shew pecuniary damage to the personal estate, and not an injury to the person or feelings of the insolvent. As to the cases cited. *Brewer v. Dew* (a) was most relied upon; and it is the

(a) 11 M. & W. 625.

strongest. But the reasons on which the judgment there was given made the case distinguishable; for that was an action for a wrong done to the plaintiff's immediate personal possession of goods; and the Court proceeded on the ground that there was a wrong independent of any question of the value of goods or the right of property.

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(No fourth Judge was present.)

Judgment for defendants (a).

(a) See *Hadley v. Baxendale*, 9 *Exch.* 341.

WILLIAM PENNELL and others, Assignees of *Tuesday, January 24th.*
SPENCER ASHLIN, a Bankrupt, *against* JACOB
ROBERT ALEXANDER and JOSIAS ALEXANDER.

ACTION on a bill of exchange for 1525*l.* 16*s.* 3*d.*, Defendants, merchants resident in Ireland, dated 3d *September*, 1851, drawn by *Ashlin* before *S. A.*, wrote to *S. A.*, a merchant

resident in *London*, authorizing him "to take for us two cargoes" of *Ibraila* corn 1000 to 1500 quarters at 24*s.* to 24*s.* 3*d.*, "payment by our acceptance at 2 or 3 months," and in postscript added, "You may go to 24*s.* 6*d.*, if you find you cannot do the work at 24*s.* or 3*d.*" *S. A.* made a bargain with *R.*, a merchant resident in *London*, for a cargo by the *C.*, and sent him a note commencing "Sold by order and for account of *R.* to our principals the cargo" of *Bulgarian* corn per *C.* at 24*s.* 6*d.* per quarter, cost, freight and insurance, "Sellers to pay a commission of two per cent. Payment in cash" in one week after receipt of documents. On the same day *R.* in his books debited *S. A.* with the price of the cargo, and sent *S. A.* the shipping documents with the bill of lading indorsed, and an invoice headed "S. A. bought of *R.*" On the same day, *S. A.* wrote to defendants "to advise having purchased for your account the cargo of *Bulgarian* corn per *C.*, at 24*s.* 9*d.* per qur. *C. R. & L.*, which is 3*d.* per quarter over your limit for *Ibraila*, but proportionately cheaper." In this letter were inclosed the shipping documents of the *C.* (including the indorsed bill of lading), and an invoice headed "Invoice of a cargo &c. bought by order and for account and risk" of defendants; and a draft for the price at 24*s.* 9*d.*, drawn by *S. A.* on defendants. Defendants returned the draft accepted, stating in the letter, "We note purchase of corn per *C.* at 24*s.* 9*d.* We would much rather have had *Ibraila* at 24*s.* or 24*s.* 3*d.*" After this, whilst the bill was still current, and before the arrival of the *C.*, *S. A.* failed. *R.* stopped the cargo of the *C.*, treating *S. A.* as the purchaser, and claiming to be an unpaid vendor to him. Defendants, on receiving an indemnity from *R.* against the bill, paid him the price less discount, at the rate of 24*s.* 6*d.*, being less than the sum for which the bill was accepted, which was at the rate of 24*s.* 9*d.*

The assignees of *S. A.*, who had become bankrupt, sued defendants on the bill. *R.*

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defended the action for them, on the ground that the consideration for the bill had failed. A case was stated for this Court, in which the correspondence, containing as above stated, was set out, and the Court had power to draw inferences of fact.

Held: that on the above documents it must be taken that, notwithstanding the form of the contract note and of the defendants' order to *S. A.*, the transaction was a sale from *R.* to *S. A.* and a sale from *S. A.* to defendants, and not a sale from *R.* to defendants through *S. A.*

And this, without reference to the fact that defendants resided in *Ireland*.

Held also that, the indorsed bill of lading being assigned to defendants for value, *R.* had no right to stop in transitu; that consequently the payment of *R.* by defendants was in their own wrong; and that the consideration for the bill of exchange had not failed, and the plaintiffs were entitled to judgment.

his bankruptcy on defendants, three months after date, accepted by defendants, and now overdue; and for goods bargained and sold, and goods sold and delivered, by *Ashlin* before his bankruptcy; and on accounts stated with *Ashlin* before his bankruptcy; and on accounts stated with his assignees since.

The only material plea was the following. Plea 4 to first count. That *Ashlin* had been employed as agent and factor for defendants to purchase corn for them, and had, as such agent, bought a cargo of Indian corn from one *Antonio Ralli* for and on account of defendants: Averment that *Ashlin* drew, and defendants accepted, the bill, "and then delivered the same to the said *Spencer Ashlin* (*a*) [for the special purpose only of the said *Spencer Ashlin* indorsing and delivering the said bill to the said *A. Ralli*] for and on account and in payment of the said Indian corn on behalf of defendants;" that *Ashlin* did not indorse or deliver the bill to *Ralli*; "but (*a*) [in violation of and contrary to the terms and purpose on which he so took and held the said bill as aforesaid (*a*),] kept and retained the said bill in his the said *Spencer Ashlin's* own possession (*a*) [*until and at the time of his bankruptcy*]." Further averments that there was no other consideration or value for the bill than as aforesaid; and that *Ralli*, before the commencement of the action, obliged the

(*a*) The plea was during the argument amended by striking out the two passages above printed between [], and by inserting the averment above printed in *Italics* between []: see post, p. 300.

defendants to pay for the cargo. Replication: De injuriâ. Issue thereon.

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To the rest of the declaration, Nunquam indebitatus. Issue on these pleas.

On the trial, before Lord *Campbell* C. J., at the *Guildhall* Sittings after *Hilary* Term 1853, a verdict was found for the plaintiffs, subject to a case, of which the material parts were as follows.

The plaintiffs in this action are the assignees of the estate and effects of *Spencer Ashlin*, who was duly declared a bankrupt on 15th *November* 1851. He stopped payment on 13th *September* 1851.

The defendants for some years last past have been residing and carrying on business as merchants at *Londonderry* in *Ireland*.

Antonio Ralli, hereafter referred to, has for some years last past been residing, and carrying on business as a corn and general merchant, in *London*, under the firm of *A. Ralli & Co.*

The first transaction of *A. Ralli & Co.* with the bankrupt was in *August* 1850; and was similar to the transaction, hereinafter mentioned, as to the cargo of the *Cleopatra*: and after that time there were many other precisely similar transactions, amounting in the whole to upwards of 30,000*l.* In every instance entries were made in *A. Ralli's* books similar to the invoice of 3d *September* 1851, first hereinafter mentioned. *A. Ralli* was paid by the bankrupt shortly after the respective transactions according to the credit given, except in certain cases in which the bankrupt paid prior to the expiration of credit, taking interest for the unexpired period of credit. Previously to the transaction as to the

1854. *Cleopatra's* cargo, the bankrupt had only one transaction with defendants.

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The case then set out several letters between the bankrupt under his firm of *Spencer Ashlin & Co.* and defendants under their firm of *J. R. & J. Alexander*; of which the material parts are here extracted.

J. R. & J. Alexander to *Spencer Ashlin & Co.*, 28th August 1851. "You may take for us two cargoes of *Ibraila* corn, 1000 to 1500 quarters, at 24/ or 24/3 per imperial quarter; bills of lading dated in *July* or *August*; payment by our acceptance at 2 or 3 months. One cargo of *Ibraila*, at same price, arrived, or near at hand, from 10 to 1200 quarters; respectable shippers; for the latter we will remit cash." "P. S. You may go to 24/6 if you find you cannot do the work at 24/ or 3d."

Spencer Ashlin & Co. to *J. R. & R. Alexander*, 30th August 1851. "We have your favour of the 28th instant, and obliged by your orders. Beg leave to inform you that we have taken for your account a cargo of Indian corn per the *Sultan*; 529 kilos. nearly 1200 quarters, from *Ibraila* at 24/6 per quarter. C. F. & Insurance. Bill of lading dated 30th *July*. On *Monday* we shall wait upon you with documents, and do what we can for you in further purchases."

J. R. & R. Alexander to *Spencer Ashlin & Co.*, 1st September 1851. "Your esteemed favour of the 30th is to hand, and note contents, which are satisfactory. You can keep the balance of our order in hand during the week."

Spencer Ashlin & Co. to *J. R. & R. Alexander*, 1st September 1851. "Herewith we beg to hand you documents and invoices p. *Sultan*:" "to your debit 938*l.* 13*s.* 0*d.*: against which we have valued upon you from date of

invoice, say *July* 29th, at 3 months' date, which balances the transaction; and we shall be obliged by your acceptance of our draft and returning the same to us. We have been unable to purchase anything more to day in execution of your order, our market being stiffer for *Ibraila* corn; but you may rely on our best exertions."

J. R. & R. Alexander to *Spencer Ashlin & Co.*, 3d *September* 1851. "Your esteemed favour of the 1st is to hand; documents of *Sultan* inclosed. We now beg to wait upon you with acceptance to your draft, and note you keep balance of our order in hand."

The case then proceeded. On 3d *September*, 1851, the following contract note was signed by the bankrupt, and sent by him to Messrs. *A. Ralli & Co.*

"*London*, 3d *September* 1851.

"Sold by order and for account of Messrs. *Antonio Ralli & Co.* To our principals. The cargo of *Bulgarian* Indian corn, fair average quality, shipped p. *Cleopatra* Captain *A. Sahari*, from *Ghiacetti*, consisting of 14000 kilos, as per bill of lading dated 10th *July* 1851, at the price of 24/6 say twenty four shillings and six pence per quarter, free on board at *Ghiacetti*, including freight and insurance to any safe port in the *United Kingdom of Great Britain and Ireland*, calling at *Queenstown* or *Cork* or *Falmouth* for orders; reckoning 816 kilos equal to 100 quarters; no charge for damage. Sellers to pay a commission of two per cent.; payment to be made in cash, less discount for the unexpired time of three months from the date of the bill of lading, in one week after receipt of documents and policies of insurance effected with approved underwriters, but for whose solvency sellers are not to be responsible, except the insurance is effected abroad; and in the latter case the loss or average, if any, is guaranteed to be adjusted and

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paid according to the custom and insurance of *Lloyd's*. In case of any dispute, it is agreed by buyers and sellers to leave the same to two *London* corn factors, mutually chosen, or their umpire, and to be bound by their decision. *Spencer Ashlin & Co.*"

This was a lithographed form, which the bankrupt was in the habit of using. The cargo of the *Cleopatra* belonged to *A. Ralli*; and the following entry was made in *A. Ralli's* books respecting the said sale of the said corn p. *Cleopatra*. "*London Septr. 4th 1851. Messrs. S. Ashlin & Co. Drs. to the cargo of I. corn per Cleopatra*" (here follows the same as in the invoice after mentioned from the words "*per Cleopatra.*").

The case then set out the following letter from *A. Ralli & Co.* to *Spencer Ashlin & Co.*, of 3d September 1851. "We herewith enclose the shipping documents for the cargo of I. corn p. *Cleopatra*, together with letter of guarantee for the insurance, and an order for the captain to follow your instructions. We also forward the invoice, and trust you will find every thing correct."

The shipping documents above referred to were in the usual form, and included the charterparty and the bill of lading, the latter of which was duly indorsed by *A. Ralli*. The following is a copy of the invoice inclosed in the said letter.

"Messrs. *S. Ashlin & Co. London September 3d, 1851.*

Bought of *A. Ralli & Co.*

The cargo of Indian corn per *Cleopatra* Captain *Saharis @ Ghiacetti*, as per bill of lading dated 10th July,

14,000 kilos. I. corn at 816^{kos.} per 100 qrs.,

equal to 1715 $\frac{1}{2}$ quarters, at 24/6 per

quarter C. F. & I. £2101 12 10

Charges.			1854.		
Freight on 1715½ quarters at			<u>PENNELL</u>		
9/3 per quarter			V.		
Gratuity.....			<u>ALEXANDER.</u>		
	£793	9 6			
	15	0 0			
	<hr/>				
	808	9 6			
Advance to captain @ <i>Ghiacetti</i>	200	0 0			
	<hr/>				
		608 9 6			
		<hr/>			
		1493 3 4			
Commission 2 p. cent.		42 0 8			
		<hr/>			
"E. E. A. R. & Co.		£1451 2 8"			
		<hr/>			

The case then set out several letters, of which the following are the material parts.

A. Ralli & Co. to Captain *Saliaris*, 3d September 1851.

"You will please follow the instructions of Messrs. *Spencer Ashlin & Co.* (or their agent) respecting your port of discharge, receiving the amount of your freight from your consignees, and without further reference to ourselves."

Spencer Ashlin & Co. to *J. R. & R. Alexander*, 3d September 1851. "Your esteemed favour of the 1st instant is duly to hand; and we now beg to advise having purchased for your account the cargo of *Bulgarian* Indian corn p. *Cleopatra* at 24s. 9d. p. quarter C. F. & I., which is 3d. per quarter over your limit for *Ibraila*, but is proportionately cheaper. We at the same time are able to enclose you documents, viz. bill of lading, charter party, the order letter to the captain, letter of guarantee for the insurance, invoice amounting to 1525*l.* 16s. 3*d.*, and our draft for this sum at 3 months'

1854. date, which please return to us, in due course of post,
 PENNELL completed with your acceptance.”
 v. “P.S. We expect this cargo will realise 60/ 61 lbs.
 ALEXANDER. “A. Ralli & Co. is one of our best sellers.”

The following is a copy of the invoice referred to in the said letter from the bankrupt to the defendants of the 3d *September* 1851. “Invoice of a cargo of *Bulgarian* Indian corn shipped on board the *Cleopatra*, Captain *Saliaris*, p. bill of lading dated 10th *July* 1851; bought by order and for account and risk of Messrs. *J. R. & J. Alexander*.

“1851. 14,000 kilos. 816.....100 qrs.
 1715½ quarters @ 24/9 £2123 1 9
 less freight @ 9/3.....793 9 6
 Gratuity..... 15 0 0
 808 9 6
 Advance at *Ghiacetti* 200 0 0
 608 9 6
 1514 12 3
 Difference 54 days' interest..... 11 4 0
 “E. E. London *September* 3d 1851. £1525 16 3
 “(Signed) *Spencer Ashlin & Co.*”

Spencer Ashlin & Co. to *J. R. & R. Alexander*, 5th *September* 1851. “We have your esteemed favour of the 3d instant, handing us your acceptance against the *Sultan* cargo, for which we are obliged. Please make our draft against *Cleopatra*, sent you last *Monday*, payable at a banker's, as this is sometimes looked to and facilitates our discounting the bill.”

J. R. & J. Alexander to Spencer Ashlin & Co., 6th September 1851. "Your esteemed favour of the 3d, and note purchase of corn p. *Cleopatra* @ 24/9. We would much rather have had *Ibraila* @ 24/ or 24/3. We enclose draft accepted; and, as we have advice today of two cargoes of *Ibraila* bought for us by our *Liverpool* agent @ 24/, you need not operate further at present on our account till you hear from us."

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The draft referred to in this letter is the bill upon which this action is brought.

J. R. & R. Alexander to Spencer Ashlin & Co., 8th September 1851. "Your esteemed favour of the 5th is to hand, and shall in future attend to your wishes in respect of the draft, as it is all one to us, the only difference being it costs $\frac{1}{4}$ th per cent. to retire at a private office and $\frac{1}{4}$ th per cent. at a banker's. When you can come in at 23/3 to 23/6 or 9d. for *Ibraila*, we may give you another order."

The case then set out a letter of 10th *September* 1851 from defendants to *Alexander Lashbrooke*, who was their agent at *Falmouth*, requesting him to order the *Cleopatra*, on arrival, to *Londonderry*; and a letter of 13th of *September* from *Lashbrooke* to the captain, so ordering him accordingly; which letter the captain received on arrival; and other letters of which the following were the material parts.

Spencer Ashlin & Co. to J. R. & R. Alexander, 8th October 1851. "We regret to find that the sellers of the *Cleopatra's* cargo of Indian corn, Messrs. *Ralli & Co.*, stopped the cargo at *Falmouth*. We have just had an interview with the lawyer, Mr. *Maynard*, and Mr. *Quilter*, the accountant to our estate, who agree that the cargo should be allowed to go on, provided you will discount

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your own acceptance for it; 1525*l.* 16*s.* 3*d.*, due on the 6th *December*. It is this peculiar position of our estate that compels them to make this request. Now we should strongly recommend you to do this at once, as you may have great difficulty to get the cargo otherwise, and be ultimately compelled to pay your acceptance. We suggest that you should send the amount of the bill to your own agents to be paid on the bill being given up in exchange, and the cargo ordered on to *Londonderry*."

J. R. & J. Alexander to Lashbrooke, 11th October 1851. "Your favour is to hand; and we have today written Messrs. *Ralli & Co.* regarding the detention of the *Cleopatra*. We hold the bill of lading indorsed by *Ralli & Co.*; but we understand they have some dispute with the original purchasers of the cargo."

J. R. & J. Alexander to A. Ralli & Co., 11th October 1851. "We are today in receipt of a letter from *Spencer Ashlin & Co.*, from whom we bought the cargo of corn per *Cleopatra*, saying that you had stopped the above cargo at *Falmouth*. We are rather surprised that you should have taken this step, which we are aware you have no right to do; but from the peculiar position of Messrs. *Spencer Ashlin & Co.*'s estate we are inclined to waive our right, and to meet your views by taking up our acceptance, due on the 6th *December*. If you wish us to do so please write us in course; and in the mean time you can allow the captain of the *Cleopatra* to proceed to this port."

J. R. & J. Alexander to Spencer Ashlin & Co., 11th October 1851. "Your letter of the 8th to hand, and are rather surprised at its contents. We are informed that Messrs. *Ralli & Co.* have no right to stop the cargo: however, under the peculiar circumstances of your situa-

tion, we are inclined to meet their views, and have written to them by this post regarding the matter."

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A. Ralli & Co. to Captain *Saliaris* of the *Cleopatra*, 13th *October* 1851. "We are in receipt of your favours of the 25th and 28th ultimo; from the last of which we see there has been presented to you an order to proceed to *Londonderry*, for discharge; and in answer we beg to repeat the same that we have written you previously through Messrs. *Fox & Co.* of your place, videlicet, that you are not to follow the instructions of any one, but to stay there, and wait till you receive further orders, and this on account of the bankruptcy of your cargo's buyer, with whom we are in negociations."

A. Ralli & Co. to *J. R. & J. Alexander*, 13th *October* 1853. "In reply to your favour of the 11th instant, we are advised by our solicitors, Messrs. *Crowder & Maynard*, who are well known here, that we have perfect right to stop the cargo of the *Cleopatra* in transitu: but, in the event of your desiring the vessel to proceed to your port, we will order the captain to do so, provided you will remit to us the amount of your acceptance due on the 6th *December*: that acceptance is now in the hands of Messrs. *Spencer Ashlin & Co.*, who have stopped payment, and of which you are already aware; and they have neither handed over the said acceptance to us, nor paid us the amount of the same; and consequently we still have a lien on the cargo. Awaiting your early reply."

A letter of indemnity was given by *A. Ralli & Co.* to the defendants, on 21st *October* 1851, which was set out in the case. The following are the material parts. "To Messrs. *Jacob Robert & Josias Alexander, Londonderry*. Gentlemen, You having purchased a cargo of Indian

1854. corn by the *Cleopatra*, and having given to Messrs. *Spencer Ashlin & Co.* your acceptance, due 6th *December* 1851, for the amount including interest, videlicet, 1525*l.* 16*s.* 3*d.*, in exchange for the bill of lading of the said cargo and the charterparty then delivered to you, and Messrs. *Spencer Ashlin & Co.* having become insolvent, without having paid us for the said cargo, we did on the arrival of the vessel at *Falmouth* stop the delivery of the cargo and countermand the orders you had given for the vessel to proceed with her cargo to *Londonderry*. It has now been agreed between you and us, the undersigned, that, in consideration of your paying to us the sum of 1472*l.* 3*s.*, being the amount to which the cargo was invoiced by us to *Spencer Ashlin & Co.*, less the guarantee commission of one per cent. agreed by us to be allowed to them, the said vessel with her cargo shall at once be allowed to proceed to her destined port agreeably to your orders, and that we, the undersigned, agree to indemnify you as hereinafter contained, and shall procure the additional guarantee of Messrs. *Ralli Brothers* of this city." Then followed a promise to indemnify against the acceptance. The case then set out a letter of indemnity from *Ralli Brothers*. Upon the above indemnities being given to them, the defendants paid *A. Ralli* 1472*l.* 3*s.* The cargo of corn per *Cleopatra* was then delivered to the defendants, in pursuance of orders from *A. Ralli*, before the commencement of this action.

The Court are to be at liberty to draw inferences of fact. The Court are to have the same powers as a Judge at Nisi prius has.

The question for the opinion of the Court is: Whether the plaintiffs are entitled to recover in this action. And

the verdict is to be entered according to the direction of the Court.

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Among the plaintiffs' written points for argument, one was: "That the action is undefended as to the sum of 74*l.* 13*s.* 7*d.*, the difference between the amount of the sale from *Ralli & Co.* to the bankrupt, and the amount of the sale from the bankrupt to the defendants, or, at all events, as to the sum of 53*l.* 13*s.* 3*d.*, the difference between the amount of the sale from the bankrupt to the defendants and the amount paid by them to *Ralli & Co.*"

Amongst the defendants' written points for argument, one was: "That the fraudulent act of the bankrupt in stating to the defendants in his letter of advice that he had purchased the cargo for them at 3*d.* a quarter more than the price mentioned in the contract note will not make the transaction a sale by him to them, or entitle the plaintiffs, as his assignees, to recover the amount of the acceptance, or the 3*d.* per quarter."

The case was now argued (a).

Bramwell, for the plaintiffs. The substantial question is, Whether *A. Ralli*, who defends this action, is to be a creditor on *Ashlin's* estate for the price of the *Cleopatra's* cargo, taking the same dividend as the other creditors, or is to be paid in full. There is no doubt that the defendants, *J. R. & J. Alexander*, are liable to pay somebody for the cargo; the question is whether they are to pay *A. Ralli* direct, or to pay the assignees of *Ashlin* the amount of the draft which they had accepted before the bankruptcy, leaving *A. Ralli* to prove as a creditor. That depends entirely on the construction which this

(a) Before Lord Campbell C. J., Coleridge and Wightman Js.

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Court will put upon the mercantile documents. These leave it a question, whether the sale was by *A. Ralli & Co.* to *Spencer Ashlin & Co.*, and then a subsequent sale by *Spencer Ashlin & Co.* to *J. R. & J. Alexander*, so that *Spencer Ashlin & Co.* stood in the relation of purchaser to *A. Ralli & Co.* and of vendor to *J. R. & J. Alexander*; or whether it was a sale by *A. Ralli & Co.* to *J. R. & J. Alexander* through *Spencer Ashlin & Co.* as an agent. Whichever be the case, stoppage in transitu, on which *A. Ralli & Co.* and *J. R. & J. Alexander* at first rested their case, is out of the question. On the first supposition, that *J. R. & J. Alexander* were the vendees, the vendees have not failed; and stoppage in transitu is a right which arises only on the failure of the vendee; *Wilmshurst v. Bowker* (a). On the second supposition, that *Spencer Ashlin & Co.* was the vendee, he has failed, and *A. Ralli & Co.* had a *primâ facie* right to stop in transitu; but, before it was exercised, the bill of lading had been *bonâ fide* transferred to *J. R. & J. Alexander*, for value; and that put an end to the right; *Lickbarrow v. Mason* (b). In either point of view, therefore, the stoppage in October 1851 was wrongful: *J. R. & J. Alexander* might, at that time, have maintained trover or detinue for the cargo; and the payment by them to *A. Ralli & Co.* to get the cargo was in their own wrong. When it is thus understood, the case comes to be, that *J. R. & J. Alexander* have, without any authority express or implied by law, paid to *A. Ralli* a debt owing to him from *Spencer Ashlin & Co.*, and cannot now set off that payment against their own debt to that

(a) 7 M. & G. 882, in Exch. Ch., reversing the judgment of C. P. in *Wilmshurst v. Bowker*, 2 M. & G. 792.

(b) 2 T. R. 63. See notes to S. C. in 1 Smith's Lead. Ca. 431.

firm. The defendants now say that the sale was from *A. Ralli & Co.* to *J. R. & J. Alexander*, who still remained debtors to *A. Ralli*, notwithstanding that the draft had been accepted; and that, in some way or other, the consideration for accepting the draft has failed. But the conduct of *A. Ralli & Co.* and *J. R. & J. Alexander* at the time of the attempted stoppage is strong evidence that the transaction really was one of sale by *A. Ralli & Co.* to *Spencer Ashlin & Co.* *J. R. & J. Alexander*, in their letter to their *Falmouth* agent, on 11th *October*, say: "We hold the bill of lading endorsed by *Ralli & Co.*; but we understand they have some dispute with the original purchasers of the cargo." And *A. Ralli & Co.* writing to the captain to stop the cargo, say it is "on account of the bankruptcy of your cargo's buyer." This shews that the parties, who knew best, both considered *Spencer Ashlin & Co.* the purchasers. And this was not a new idea; for *A. Ralli & Co.*, at the time of the sale, debited *Spencer Ashlin & Co.* in their books, and made out an invoice to them as purchasers. And *Spencer Ashlin & Co.* request *J. R. & J. Alexander* that the bill may be made payable at a banker's, as it "facilitates our discounting the bill:" and, though the bill had already been accepted before *J. R. & J. Alexander* received this request, they promise to observe it in future; so that it is clear that the bill was intended by both drawer and acceptor to be negotiated by *Spencer Ashlin & Co.*, and to be their property, and was not sent merely to be handed over by them to *A. Ralli & Co.* Against this is to be set the form of the advice note, which, being a lithographed form used by *Spencer Ashlin & Co.* in all their transactions, is expressed as if they were brokers buying for a principal; and the language of the order

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1854. of *J. R. & J. Alexander*, and of the invoice sent to them,
 PENNELL which state that it was a purchase on account of *J. R.*
 v. & *J. Alexander*. But this is merely verbal criticism;
 ALEXANDER. the substance shews that it was a sale and subsale;
 indeed, if it were otherwise, there would have been a
 gross fraud in *Spencer Ashlin & Co.* in charging an
 advanced price. Had all the parties continued solvent,
A. Ralli & Co. could not have sued *J. R. & J. Alexander*;
 nor could *J. R. & J. Alexander* have resisted an action
 by *Spencer Ashlin & Co.*; for, whenever a purchase is
 made on behalf of a foreign merchant, credit is neces-
 sarily given exclusively to the home merchant, who is a
 vendor to the foreigner, though adding a commission;
Smyth v. Anderson (a), *Paterson v. Gandasequi* (b),
Thomson v. Davenport (c). Ireland is, like Scotland,
 a foreign country within the meaning of this rule.

Bovill, contra. The case very much depends upon
 the question whether *Spencer Ashlin & Co.* were pur-
 chasers from *A. Ralli & Co.*, or merely brokers making
 a contract for them. As to that, the documents are
 produced; and they must speak for themselves. In the
 written contract, on 3d September, *Spencer Ashlin & Co.*
 state that the cargo is "Sold by order and for account
 of Messrs. *Antonio Ralli & Co.* To our principals;" and
 they charge the sellers two per cent. commission. And
 it was perfectly true that they had principals; for *J. R.*
 & *J. Alexander* had given them an order, on 28th August,
 "to take for us two cargoes of *Ibraila*." This is not an
 offer to buy from *Spencer Ashlin & Co.* as vendors, but
 an order to that firm to buy as agents for them; and so

(a) 7 Com. B. 21.

(b) 15 East, 62.

(c) 9 B. & C. 78.

Spencer Ashlin & Co. understood it; for, in the letter of 1st September, they write, "We have been unable to purchase anything more today in execution of your order." And, on the same day on which they send *A. Ralli & Co.* the advice note stating that they had sold the cargo for him to their principals at 24/6, they write to *J. R. & J. Alexander*, "to advise having purchased for your account the cargo of *Bulgarian* Indian corn per *Cleopatra* at 24/9 per quarter C. F. & L, which is 3d. per quarter over your limit for *Ibraila*, but is proportionably cheaper:" and in a postscript they tell who was the seller: "*A. Ralli & Co.* is one of our best sellers." *A. Ralli & Co.*, in their books and in the invoice, debit *Spencer Ashlin & Co.*: but they debit them with the price after deducting two per cent. commission; and the letter of indemnity explains how that was. One per cent. was for a commission of guarantee; the other one per cent., though this is not expressly stated, must have been the commission on an ordinary sale. It was quite natural that the vendor should debit the del credere broker. In the written points delivered it is said that, because *Spencer Ashlin & Co.* represented to *J. R. & J. Alexander* that they had bought at 24/9, whereas in truth they had bought at 24/6, the action is undefended as to the extra 3d. But such a representation was a fraud. [*Wightman J.* In the case as you put it, that *Spencer Ashlin & Co.* were agents for *J. R. & J. Alexander*, they might have said "We have bought at 24/6, which together with our commission of one per cent. makes it equal to 24/9;" and that would have produced the same money result.] It might be so: but the account is not so made out. But, in whatever way that extra 3d. may be explained, the transaction is one

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1854. of a broker del credere; and the fact that an agent has a del credere commission does not affect the right of the principal to enforce the contract; *Story on Agency*, s. 420. [Lord *Campbell* C. J. But does not the principal, by taking a del credere engagement from an agent, authorize that agent to get payment from the other principal in any way he pleases? And, if so, might not *Spencer Ashlin & Co.*, even if only del credere agents, still take the bill?] If they were authorized to take a bill, the bill would belong to the vendors *A. Ralli & Co.*, not to the assignees of the bankrupt factor; *Ex parte Dumas* (a), *Scott v. Surman* (b). Supposing that a merchant in *Ireland* is to be considered a foreign principal, the mercantile rule of giving credit exclusively to the home agent is for the benefit of the vendor not of the agent: but in *Thomson v. Davenport* (c) the vendor recovered against the principal though resident in *Scotland*. The correspondence after the stoppage of *Spencer Ashlin & Co.* ought not to have much weight. The parties then were seeking how they might best save their money; and they by mistake thought that they could stop in transitu. They did, no doubt, by their conduct make evidence that the sale was to *Spencer Ashlin & Co.*; and, if there had been no other evidence, that should have prevailed: but the real transaction appears.

(He admitted that the averment that the bill was not to be negotiated was not proved, but prayed leave to amend under the power reserved in the case. Some discussion ensued as to the manner in which the plea

(a) 1 *Atk.* 232.

(b) *Willes*, 400.

(c) 9 *B. & C.* 78.

should be amended; ultimately it was amended as stated, ante, p. 284.)

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Bramwell, in reply. As the plea is now amended, the case seems to be put in some such way as this: though the bill was given to *Spencer Ashlin & Co.* that he might discount it, and though he, whilst *sui juris*, might lawfully use it as his own, yet as soon as he failed there arose a trust for *A. Ralli & Co.* But that is not law. When a sale is made by an agent for a bill which he holds in trust to hand over to his principal in specie, or to apply it to any special purpose, then, on the agent's bankruptcy, the bill does not pass to the assignees, except as being in the order and disposition of the bankrupt; and on that point of order and disposition the earmarking of the bill is most material; that is the principle of *Ex parte Dumas* (a) and *Scott v. Surman* (b). But in the present case the bill was expressly given for the purpose of being discounted: it belonged to *Spencer Ashlin & Co.* till their failure, and then passed to the assignees, who must recover on it unless the consideration has failed. As to that, the residence of *J. R. & J. Alexander* in *Ireland* is most material. It is the universal custom that, in dealings by a commission merchant for a foreign constituent, credit is exclusively given to the commission merchant: and this is done, not merely because the home vendor will not trust the foreigner, but because the foreigner desires to be able to pay his correspondent as may be convenient, which he could not safely do if his own credit were pledged. In

(a) 1 *Atk.* 232.

(b) *Willes*, 400.

1854. *Poirier v. Morris* (a) *Crompton* J. explains this. He says: "There are very many mercantile cases in which a person is employed as an agent to buy, but without any authority to pledge his principal's credit. In the ordinary case of a *Liverpool* merchant purchasing cotton at *New Orleans*, the constant custom is to write to his correspondents there to buy cotton for him on commission. The *New Orleans* house buy as the *Liverpool* merchant's agents; they charge him the cost price and a commission for buying the cotton for him; but they cannot pledge his credit for the cotton. They must buy it on their own credit, or pay for it out of their own funds." Now, if a *London* merchant acting for a *Londonderry* house is in the same position as a *New Orleans* house acting for a *Liverpool* one, every document in this case is explained at once. *Spencer Ashlin & Co.* were buying as agents for *J. R. & J. Alexander*; and they charged them the cost price, adding a commission of 3*d.* per quarter; but they had no authority to pledge the credit of *J. R. & J. Alexander*; and they did not do so. The corn was obtained on *Spencer Ashlin & Co.*'s own credit: *A. Ralli & Co.* properly debited them with the price; and *J. R. & J. Alexander*, who were debtors to *Spencer Ashlin & Co.*, properly accepted their draft, which they must now pay to their assignees.

Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*January* 31st), delivered the judgment of the Court.

(a) 2 *E. & B.* 89. 101. See *Wilson v. Zulueta*, 14 *Q. B.* 405.

We are of opinion that the plaintiffs are entitled to recover. If this decision operates a hardship upon *Antonio Ralli*, who has indemnified the defendants, he has himself to blame for entries in his books, and letters written by him, giving an untrue account of the transaction out of which the bill of exchange declared upon originated. The question is, whether we are to consider that the cargo of the *Cleopatra* was sold by him to the defendants through *Ashlin* as his agent, or that he sold the cargo to *Ashlin*, and that *Ashlin* resold it to the defendants.

Upon the former supposition, the fourth plea would be established; and, the bill accepted by the defendants for the cargo of the *Cleopatra* remaining in *Ashlin*'s hands down to the time of his bankruptcy, the property in it would not vest in his assignees, as he held it only as trustee for *Ralli*, nor could the assignees recover the price of the corn as for goods sold and delivered. The plaintiffs indeed have said that, as to the difference between the 24/6 and 24/9 a quarter, this is an undefended action; but, although *Ralli* might not be entitled to recover more than at the rate of 24/6, if the corn never was the property of *Ashlin* his assignees cannot sue for any part of the price of it; for the fraud which he perpetrated in charging the defendants a higher price than that at which he had purchased as their agent could vest no right of action in his assignees.

On the other hand, if this was a sale by *Ralli* to *Ashlin* and by *Ashlin* to the defendants, the fourth plea is not supported; there was no right to stop in transitu, on *Ashlin*'s insolvency, after the resale and the bill of lading had been indorsed to the defendants; and the

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1854. assignees are entitled to recover on the bill of exchange.

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In coming to the conclusion that this was a sale by *Ralli* to *Ashlin*, we wish it to be understood that in this case we attach no weight to the circumstance that the defendants resided at *Londonderry*, and for some purposes might be regarded as foreigners. We do not think that the class of cases headed by *Paterson v. Gandesequi* (a) have any application to such a dealing; and we should have arrived at the same conclusion had the defendants resided at *Plymouth* or *Newcastle upon Tyne*. We are influenced by the written documents evidencing the transaction, which, we think, satisfactorily shew that *Ralli* treated *Ashlin* as the purchaser of the corn, and looked to him exclusively for payment. *Ashlin* was certainly supposed by *Ralli* to be selling the corn to a purchaser at the price for which *Ralli* was credited, *Ashlin* receiving no profit beyond a commission: and he made the defendants believe that he charged no more than the price at which he purchased in the market. But still he was considered by *Ralli* as the purchaser, and by the defendants as the vendor. Although the sold note in the lithographed form has the aspect of *Ashlin* being only a broker, by "our principals" *Ralli* seems to have understood *Ashlin* himself; for in his own books he immediately made an entry stating that *Ashlin* was indebted to him for the cargo of the *Cleopatra*, in the common form as if *Ashlin* had been the purchaser; and, along with the bill of lading and shipping documents connected with the cargo, he sent to *Ashlin* an invoice of which the following is a copy.

(a) 15 East, 62.

"Messrs. S. Ashlin & Co. London September 3d, 1851.

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Bought of A. Ralli & Co.

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The cargo of Indian corn per *Cleopatra* Captain
Sakaris @ *Ghiacetti*, as per bill of lading dated 10th
July,

14,000 kilos I. corn at 816^{kos.} per 100 qurs.,
equal to 1715½ quarters, at 24/6 per
quarter C. F. & L. £2101 12 10

Charges.

Freight on 1715½ quarters at			
9/3 per quarter	£793	9	6
Gratuity.....	15	0	0
	808	9	6
Advance to captain @ <i>Ghiacetti</i>	200	0	0
		608	9 6
		1493	3 4
Commission 2 per cent.	42	0	8
"E. E. A. R. & Co.	£1451	2	8"

Ashlin, in writing to defendants and sending them the bill of lading and shipping documents, does state, and state falsely, that he had purchased the cargo of the *Cleopatra* on their account at 24/9 the quarter; and, by his invoice making the price to amount to 1525*l.* 16*s.* 3*d.*, he represents that the cargo was bought by order and for account of *J. R. & J. Alexander*; but even then he acts as a principal; for he desires them to make the bill he drew against the cargo of the *Cleopatra* "payable at a banker's, as," he says, "this is sometimes looked to, and facilitates our discounting the bill."

Ralli's subsequent conduct and declarations clearly indicate that he had sold the cargo of the *Cleopatra* to

1854. *Ashlin*; for, *Ashlin* having stopped payment while the
PENNELL *Cleopatra* with the cargo on board was at *Falmouth* on
v. her way to *Londonderry*, *Ralli* stopped the cargo in
ALEXANDER. transitu on the ground of the insolvency of *Ashlin*, whom
he treated as the purchaser.

The defendants in this stage of the transaction represent themselves as the purchasers from *Ashlin*, not from *Ralli*; for in their letter of 11th October 1851 to *Lashbrooke* they say: "We hold the bill of lading indorsed by *Ralli & Co.*; but we understand they have some dispute with the *original purchasers* of the cargo:" and, in their letter of the same date to *Ralli*, they say: "We are today in receipt of a letter from *Ashlin & Co.*, from whom *we bought the cargo of corn per Cleopatra.*" They then go on to deny *Ralli's* right to stop in transitu, they having purchased from *Ashlin*.

The subsequent arrangement between the defendants and *Ralli*, by which they were allowed to receive the cargo, paying him at the rate of 24/6 a quarter, and he indemnifying them from their liability on the acceptance and against any demand of *Ashlin*, or his assignees, could not prejudice the rights of the assignees if the cargo had been sold by *Ralli* to *Ashlin*.

Upon the whole, we are of opinion that the defendants are liable in this action, and that *Ralli*, paying the amount of the bill under his guarantee, must be contented to take a dividend, under the fiat against *Ashlin*, along with *Ashlin's* other creditors.

Judgment for the plaintiffs.

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MOWATT against Lord LONDESBOROUGH.

ASSUMPSIT (declaration of 14 *November* 1849) for 10,000*l.* for money had and received, money lent, interest, and on an account stated.

The provisional directors of a projected railway Company issued circulars, stating that they had made

arrangements with the S. Company securing important advantages to the projected Company, which justified the directors in asserting that their proprietors would be insured against loss, and in proceeding to Parliament, and adding, "in the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction."

This circular coming to plaintiff's knowledge, he applied, in writing, for shares: the directors, in a written answer, inclosing the circular, stated that shares were allotted to him; that he must pay the deposit by a day named; and, on his doing so and presenting the letter, a receipt would be given him, which would be exchanged for scrip on his executing the Parliamentary contract and subscribers' agreement. He paid the deposit, got the receipt, executed the contract and agreement, and got the scrip.

The agreement was a deed, prepared before the issuing of the circular, in two parts: the subscribing shareholders of the first part, and two trustees of the second. The subscribers agreed with the trustees to form a Company; and the ordinary powers, including those necessary for obtaining an Act, were given to the provisional directors; and it was agreed that such directors should be indemnified in respect of all acts done in pursuance of their powers, and should, out of the funds of the Company, reimburse themselves all expenses incident thereto: that the subscribers should make deposits; that the directors might apply the funds for the purpose of the undertaking as they should think expedient; that, whether the Act should be obtained or not, the subscribing shareholders would indemnify the provisional directors all expenses incurred by them in executing their powers.

No Act was obtained: and the S. Company made no payment. The directors expended part of the fund, raised by the deposits, in expenses bona fide incurred in attempting to obtain the Act.

On an action for money had and received, brought by plaintiff against a provisional director who was a party to the circular and subsequent proceedings: Held, that such action lay for the whole deposit without deduction, on the undertaking to return; for that the contract embodying such undertaking was: (1) not merged in the subscribers' deed, which was between other parties, and for other purposes; (2) not superseded by such deed, or controuled by the clause of indemnity therein; the execution of the deed being an act done in the performance of the original contract in consideration of the directors undertaking to return the deposit.

Held, also, that the contract, being made up of the written correspondence and the acts of the plaintiff, was not wholly in writing, and required no stamp.

Before action brought, plaintiff wrote to defendant, stating that he claimed interest from a time named, which was earlier than the date of his demand, and not stating to what time he claimed it: Held a sufficient compliance with stat. 3 & 4 *W. 4. c. 42. s. 28.*, so as to entitle the jury to give interest from the date of the demand to the time of payment of the principal.

After the scrip was obtained as above, the secretary of the Company explained to plaintiff that the reason of the directors issuing the circular was that they had a guarantie from the S. Company against all expenses; and he afterwards wrote to plaintiff, inclosing the circular, and stating that the guarantie of the directors for the return of deposits was made in pursuance of one they had received from the S. Company. Plaintiff then agreed to take

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more shares, and received a letter of allotment, as before: but, as to some of these last, he named certain persons to whom the shares were allotted, as his nominees and for him; and the scrip was obtained by plaintiff for the whole, he paying all the deposits, but his nominees only executing the contract and agreement in respect of the shares in their names. Held, that plaintiff was entitled to recover the deposits as to this scrip also; there being no distinction between the different contracts as to any of the above points.

Pleas (of 1 *December* 1849): 1. Non assumpsit. Issue thereon.

2. As to 2000*l.*, parcel &c., and the causes of action in respect of such sum, payment by plaintiff to defendant, and acceptance and receipt by defendant, of 2000*l.* in full satisfaction and discharge. Replication, denying payment, acceptance or receipt in full satisfaction &c. Issue thereon.

The particulars of demand stated that the action was "brought to recover the sum of 2200*l.*, the balance of the deposit of 2*l.* 2*s.* 0*d.* per share, paid by the plaintiff upon 2000 shares in a projected railway called *The Dover and Deal Railway and Cinque Ports Thanet and Coast Junction*, of which the defendant was a member."

On the trial, before Lord *Campbell* C. J., at the *London* Sittings after *Hilary* Term 1853, a verdict was found for plaintiff for 2871*l.* damages and 407*l.* costs, subject to a special case, to be turned into a special verdict upon the application of either party, upon the facts to be stated; the Court to have power to amend and to dictate the terms of the special verdict, inserting such inferences of fact as they may think proper to draw. The case as stated, so far as is material to the points decided, was as follows.

The defendant, at the time of the transactions which form the subject of this action, bore the name of Lord *Albert Conyngham*; he subsequently assumed the name of *Denison*; and, during the pending of this action, was raised to the peerage by the title of Baron *Londesborough*.

In *October* 1845, a projected company, called *The Dover and Deal Railway and Cinque Ports Thanet and*

Coast Junction Company, was formed and provisionally registered for the purpose of obtaining an Act of Parliament to enable the said Company to construct a railway from *Dover* to *Deal*, by means of a capital of 180,000*l.*, to be raised by subscription in 9000 shares of 20*l.* each; whereupon a deposit of 2*l.* 2*s.* per share was to be made. And divers persons, of whom the now defendant was one, became members of the provisional committee, and also of the managing committee, and provisional directors of the said Company.

During the latter part of 1845, and early part of *January* 1846, negotiations were going on, between the defendant and the said members of the managing committee of the said projected railway Company and *The South Eastern Railway Company*, which resulted, in *January* 1846, in the latter Company, through their chairman, (for the purpose of encouraging the said projected Company to proceed, and of inducing persons to subscribe thereto) agreeing with the said managing committee, that, if the managing committee would not abandon their project, but would proceed therewith, and apply to Parliament for an Act to authorize the making of the said railway, and would hand over the said scheme to the said *South Eastern Railway Company* in the event of an Act being obtained, *The South Eastern Railway Company* would, in the event of the application to Parliament failing, insure *The Dover and Deal Company* against any loss which might be caused to the said Company by such rejection, and would defray and pay all expenses which should be incurred by them in endeavouring to obtain the Act of Parliament, and supply them with money to return the deposits on shares; and would, in the event of the Act being obtained, allot to the pro-

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prietors of *The Dover and Deal Company*, in lieu of stock in that Company, shares in *The South Eastern Railway Company*.

No shares in the said projected Company had been subscribed for before 24th *January* 1846.

On 24th *January* 1846, a meeting of the committee of management of the said projected Company was held; at which defendant attended, and took the chair; and the result of the negotiation with *The South Eastern Railway Company* was communicated to the meeting; and the form of a circular letter, stated to have been settled and approved by *The South Eastern Railway Company*, and which was proposed to be addressed to each applicant for shares in the said projected Company, was produced, and read to the said meeting. Whereupon it was resolved by the said meeting, with the assent of defendant, that the said form of letter should be adopted and sent accordingly.

The said form of letter was as follows.

"*Dover and Deal Railway*, 7, *Coleman Street*,
24th *January* 1846.

"Sir,—In forwarding you the accompanying letter of allotment, the directors desire to explain that they have delayed issuing any shares until the standing orders of both Houses of Parliament have been complied with, and certain arrangements, entered into with *The South Eastern Railway Company*, had been brought to a conclusion. The directors have now the greatest satisfaction in stating that arrangements with *The South Eastern Company* have been concluded: and they are fully justified in asserting that the Company will be placed in such a position as to insure its proprietors against loss; and, in the event of the passing of the

bill, shares in *The South Eastern Railway* will be allotted to the proprietors in lieu of stock in this Company. The directors, in making this announcement, feel that the affairs of the Company, as now settled, are on such a basis as to secure important advantages to its proprietors, and to warrant the directors in proceeding to Parliament with the undertaking with every expectation of success.

"In the event of the Act not being obtained, the directors undertake to return the whole of the deposits without deduction.

"By order. *S. P. Hook,*
G. T. Thompson, } Joint Solicitors."

The case then set out two letters from Mr. *Hook*, dated 23d and 24th *January* 1846, to Doctor *Elliott*, a friend of plaintiff, each inclosing a copy of the above circular, recommending the scheme, stating that the Company had "a guarantee with *The South Eastern Company* against all actions," and offering to allot shares to Doctor *Elliott* and his friends.

On or about 26th *January* 1846, these two letters, with their two inclosures, were shewn by Doctor *Elliott* to plaintiff, who thereupon authorized Doctor *Elliott* to apply for 500 shares in the said projected Company on plaintiff's behalf. Dr. *Elliott* accordingly applied to Mr. *Hook* for 500 shares on behalf of plaintiff. And, subsequently to such application, and shortly after the said meeting of 24th *January* 1846, the following letter of allotment, together with a printed copy of the said circular letter above set forth, was forwarded to the plaintiff by the secretary of the Company, acting by the authority of defendant and the other members of the said managing committee.

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" *Dover and Deal* Railway, registered provisionally.

" 500 shares, Deposit 2*l.* 2*s.* per share, 1050*l.*

" No. 1.

" No. 7, *Coleman Street, London*, 24th January, 1846.

" Sir, I have to inform you that the provisional directors have, on your application, allotted to you 500 shares in this undertaking; and that the deposit thereon must be paid to one of the undermentioned bankers, on or before the 29th instant: otherwise the allotment will be void. On presentation of this letter, and payment of the deposit, the bankers will give a receipt, which will be exchanged for scrip on your executing the Parliamentary contract and subscribers' agreement.

" I am, Sir, your most obedient servant,

" *J. M. Hook, Secy.*

" *Francis Mowatt, Esquire.*"

Then followed the names of the firms of three banks, and a blank receipt, which was in the form after given (page 317).

The Parliamentary contract and subscribers' agreement were forms of deeds which were prepared, to be executed by the subscribers to the said provisionally registered Company, on or about the day they bear date. The Parliamentary contract contains nothing material to this case beyond what is also contained in the subscribers' agreement. The subscribers' agreement is as follows.

" *Dover and Deal* Railway.

" Subscribers' agreement.

" This indenture, made the 1st day of January in the year of our Lord 1846, between the several persons whose respective names and seals are hereunto subscribed and affixed in the schedule hereto of the one

part, and *William Brook*, of" &c., "and *William Frederick Forrest*, of" &c., "trustees named and appointed, and who hereby agree, to act for the purpose of enforcing and giving effect to the covenants hereinafter contained, of the other part: witnesseth that every person, party hereto of the first part, together with the persons who have subscribed their names and affixed their seals, or who may subscribe their names and affix their seals, in the schedule to one other indenture of the same date, tenor, purport and effect as these presents, and in which said other indenture reference is made to this present indenture, and as concerning only the acts and defaults of himself and herself, respectively, and his and her respective executors and administrators, doth hereby, for himself and herself respectively, and his and her respective heirs, executors and administrators, covenant promise and agree with and to the said *W. Brook* and *W. F. Forrest*, their executors and administrators, in manner following; that is to say: That the several persons parties hereto of the first part, together with such other persons as aforesaid, shall and will constitute, and they do hereby, so far as they lawfully, can form themselves into, a company," &c. (describing the undertaking). Then followed provisions as to the title of the Company, its capital, and the shares. Provisional directors, of whom defendant was one, were appointed. The parties of the first part agreed to such acts as the provisional directors might judge expedient for giving effect to the rules, restricting their liability to their subscription. Power was given to the directors to manage the undertaking, by having surveys and estimates made, and notices served, and agreements made, &c.; and taking measures for obtaining an Act or Acts of Parliament. "That the pro-

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- visional directors shall be fully indemnified against and in respect of all contracts, arrangements, acts and things whatsoever by them, in pursuance of the powers and provisions of these presents, entered into, made, done and authorized, and they are hereby empowered to retain and reimburse themselves respectively out of the funds of the Company all costs, losses, damages and expenses which they respectively may incur or be put to in or about or incident to all such contracts, arrangements, acts and things." "That every subscriber shall, upon or in respect of every share of the said present capital held by him or her, pay a deposit of 2*l.* 2*s.* per share, at or before the time of subscribing these presents: but, until the proposed Act or Acts of Parliament shall have been obtained, no further deposit or sum shall be called for, except in the event and for the purposes hereinafter expressed: and that no sum exceeding 5*l.* per share of the capital of the said Company shall be applied in or towards the expenses of the proposed application to Parliament. That it shall be distinctly provided in such Act or Acts of Parliament that no call shall be made upon the subscribers to the said undertaking, or any of them, which shall exceed the sum of 2*l.* per share at any one time; and also not more than four calls shall be made in any one year: and that there shall be an interval of three months at least between the calls." The directors were empowered to apply the funds for the purposes of the undertaking, in such manner and at such times as they should think expedient. "That each and every of the said several persons parties hereto of the first part shall and will, within twenty one days after notice for that purpose in writing," "duly sign, seal and deliver such indentures or Parliamentary

undertakings or subscription contracts, and all such other deeds and agreements, as shall from time to time be required by the standing orders of the Houses of Parliament respectively, or either of them," or which the provisional directors might deem desirable or necessary; "and shall and will at the same time pay to such person or persons as the provisional directors shall appoint to receive the same such further rateable sum per share (if any) as shall be necessary in order to make up any proportion of the subscribers' capital of the said Company which shall for the time being be required by the standing orders of the Houses of Parliament respectively, or either of them, to be paid upon the execution of such Parliamentary undertaking or subscription contract as aforesaid, over and above the amount of the deposit;" "and shall and will, but subject to the restrictions and limitations hereinafter contained, also duly seal and deliver any other Parliamentary undertaking or undertakings, or subscription contract or contracts, rendered necessary by renewed application or applications to Parliament," "and pay such further portion (if any) of the subscribed capital of the said Company as may for the time being be called for by the provisional directors, or may be required by the standing orders of the Houses of Parliament respectively, or either of them; the same to be paid upon the execution of any such Parliamentary undertaking or subscription contract respectively." In case of neglect to comply with the powers lastly contained for the execution of such undertaking, contract or deed, or to make such payments, the directors were empowered to determine the interest of the party making default in the undertaking. "That, whether the said Act or Acts of Parliament shall or

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1854. shall not be obtained, the several persons, parties hereto of the first part, shall and will save harmless and keep indemnified the provisional directors, and every individual member thereof, from and against all costs, charges, damages, losses and expences which they or any or either of them shall or may incur, adopt, sustain, be at or be put unto, in or about the execution of the trusts, powers, directions and authorities committed to them by these presents; such costs, charges, damages and expences to be respectively computed, assessed, paid and made good by the said several persons, parties hereto of the first part, respectively, and their respective executors and administrators, rateably, according to the amount of the sum subscribed by the said several persons respectively." Then followed provisions as to the abandonment of the undertaking under certain circumstances. The deed was signed and sealed by Messrs. *Brook and Forrest*, the trustees.

The Schedule before referred to.

Christian and Surname.	Description.	Place of Abode.	Amount of Subscriptions.	Amount paid up.	Signature.	Seal.	Date of signing.	Witness.
<i>Albert Conyngham.</i>	Lord.	<i>Sandgate, Kent.</i>	£ 2000	£ 210	<i>Albert Conyngham.</i>	<i>l. s.</i>	1846. 27th January.	<i>S. P. & B. Hook.</i>
<i>Francis Mowatt.</i>	Gentleman.	14 <i>Devonshire Place.</i>	10,000	1056	<i>Fras. Mowatt.</i>	<i>l. s.</i>	29th January.	<i>Jas. Morley Hook.</i>

The deed above set forth was executed by defendant on 27th *January* 1846.

On 28th *January* 1846, plaintiff paid to *The Commercial Bank of London*, being one of the banks in the letter of allotment mentioned, to an account opened there by the authority of defendant and the rest of the provisional

directors of the Company, the said deposit of 2*l.* 2*s.* per share: and plaintiff received from the said bank the following receipt, filled up in a form printed at the foot of the letter of allotment as sent to the plaintiff.

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"Dover and Deal Railway,

"No.

"January 28th, 1846.

"Received the sum of 1050*l.*, on account of the provisional directors of the above named Company. For the Commercial Bank of *London.* A. G. Hall. 1050*l.*"

The subscribers' agreement above set forth was executed by the plaintiff in respect of the said 500 shares on the 29th *January* 1846.

In the beginning of *February* 1846, Mr. *Hook* applied to plaintiff to take further shares in the Company, and called plaintiff's attention to the printed circular. The plaintiff required some further assurance, and said that, if Mr. *Hook* would bring him a letter written by the authority of the directors, he would take other shares. Mr. *Hook* promised to endeavour to do so, but subsequently returned, and said that the board had broken up for the day, so that he could not bring any letter from them, and handed the plaintiff the following letter written by himself without seeing the board.

"7 Coleman Street, 3d February 1849.

"Dear Sir,

Dover and Deal Railway.

I enclose you, agreeably to my promise, the printed letter setting forth the terms this Company has made with *The South Eastern Company*, the original of which was revised, approved of and passed by the board of that Company. I also enclose you the announcement the committee of this Company has made to the public; by

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which you will observe the guarantee they give for the return of the whole of the deposits in the event of their not obtaining an Act; which guarantee they have made in pursuance of one they have received from *The South Eastern Railway Company*." Signed by Mr. Hook.

In this letter was enclosed a copy of the circular of 24th *January* 1846. Plaintiff then agreed to take 1500 more shares: and, on 3d *February* 1846, received a letter of allotment for 750 shares in the Company, to the same effect, and issued by the same authority, as his first mentioned letter of allotment, accompanied by another copy of the circular of 24th *January* 1846, also so issued. And, on the same day, letters of allotment for 750 other shares, of the same effect, and issued by the same authority, and accompanied by similar letters also so issued, were forwarded to Messrs. *Elliot, Fielder and Barnes*, at the plaintiff's request, and as his nominees, he not wishing to appear as holder in his own name of so many shares.

On 4th *February* 1846, plaintiff paid the deposit, on the 1500 shares, of 3150*l.*, in the same manner as the deposit on the first lot, and executed the subscribers' agreement in respect of the 750 shares allotted to him; and, on the same day, Messrs. *Elliot, Fielder and Barnes* executed the same in respect of the 750 shares allotted to them respectively.

Upon the last mentioned execution of the subscriber's agreement by the plaintiff, scrip certificates were, by the authority of defendant and the other members of the said managing committee, given to the plaintiff in exchange for the banker's receipts of the deposit of 2*l.* 2*s.* each upon the said 500 and 1500 shares.

The form of the scrip certificates so given was as follows.

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" *Dover and Deal Railway Company.*

" No. 506 to 510.



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" Five shares.

Registered Provisionally.
" This is to certify that the holder hereof is the proprietor of 5 shares of 20*l.* each in the above undertaking, on which a deposit of 2*l.* 2*s.* per share has been paid, subject to the fulfilment of the conditions of the Parliamentary contract and subscribers' agreement, which have been duly executed in respect thereof.

" *London, 31st January, 1846.*

" *Albert Conyngham* } Provisional
" *H. W. Beauclerk* } Directors.

" *J. M. Hook,*
Secretary."

Before the second lot of shares was applied for by plaintiff, Mr. *Hook* explained to plaintiff the nature of the guarantie given by *The South Eastern Railway Company*, so far as to say that the reason of the directors of *The Dover and Deal Company* issuing the said circular was, that they had a guarantie in terms from *The South Eastern Company* against all expences.

The whole of the remaining shares in the projected Company were allotted in like manner and under similar circumstances. The scheme for the formation of the said Company was perfectly fair and bonâ fide, and was only abandoned by reason of the determination of the group committee hereinafter mentioned. The

1854. standing orders of both Houses of Parliament were duly
MOWATT complied with. A bill was, in the session of 1846,
v. promoted by defendant and the said other members of
LORD the managing committee, in the House of Commons, to
LONDES- authorize the construction of the Railway, and duly
BOROUGH. prosecuted by them. But, on 29th *June* 1846, the
group committee, to which the bill was referred in consequence of the large number of projected railway schemes, reported to the House that the preamble had not been proved; and the bill was lost: and no bill for the construction of the said projected railway was ever passed.

The deposit made with the Accountant General, in compliance with the standing orders of Parliament, was accordingly, on the 1st *July* 1846, received back; and, out of the deposit so paid as aforesaid, defendant and the other provisional directors of the Company, subsequently, on 4th *August* 1846, returned to plaintiff and the other allottees of shares in the projected Company the sum of 1*l.* per share. The residue of the deposits, so paid by plaintiff and other allottees, was spent upon the reasonable and necessary expences of the said application to Parliament, being such as fell within the terms of the said subscribers' agreement, if that deed gave authority to the directors to deal with the deposits as against plaintiff, with the exception of a small balance of about 309*l.*, which was subsequently handed over to the official manager charged with the winding-up of the Company under the Winding-up Acts; but which is not enough to satisfy the still unpaid expences of the application to Parliament, being similar expences to those before mentioned.

On 18th *December* 1846, plaintiff wrote and sent to the provisional directors of the Company a letter as follows.

"To the directors of *The Dover and Deal Railway Company*.

"14 *Devonshire Place* ; 18 *December*, 1846.

"Gentlemen,—I hold 1830 shares of *The Dover and Deal Railway Company*, the remainder of the deposit money on which, amounting to 1*l.* 2*s.* per share, I have for a long time been in daily expectation of receiving a notice from you to apply for, in pursuance of the engagements subsisting between us. Having made several applications, however, at the office to your solicitor and the secretary, without being able to learn when you purpose to return the said remainder of the said deposit money, and a period of six months having now elapsed since the rejection of the bill by Parliament, I have to request that you will be pleased, without further delay, to repay to me the said money, amounting to 2013*l.* I have to add that I shall expect to be paid interest, at the rate of 5*l.* per cent. per annum, on the said money, commencing from one month after the return of the money to you by the Accountant General: which period, together with the interval that intervened from the rejection of the bill, I think was amply sufficient to enable you to make the necessary arrangement for the repayment of the said money. You will doubtless remember that, in addition to your advertisements in the public papers promising the return of the money, and the engagement contained in your circular letter to me which accompanied the allotment of shares, and dated the 24th of *January* 1846, to the same effect, I hold a special letter of guarantee that, in the event of the Act not being

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1854. obtained, the directors undertake to return the whole of the deposits without deductions; signed by the solicitor to the Company, and written, as therein stated, by the direction of your board; and on the faith of which I accepted the shares and paid the deposit on them." Signed by plaintiff.

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To which plaintiff received the following reply on or about the date thereof.

"*Dover and Deal Railway Company, No. 7, Coleman Street, 6th January 1847.*

"Sir,—In answer to your letter of the 18th ultimo, addressed to the board of this Company, I am directed to inform you that they have not yet been able to obtain a settlement with *The South Eastern Company*; but that they have taken proceedings against them for that purpose, the results of which will be communicated to the shareholders immediately it is known. And I am desired to add that the directors will at all times be ready and happy to afford you any information upon the subject you may require. I am, Sir, your most obedient servant, *J. M. Hook, Secy. Francis Mowatt, Esqr.*"

The plaintiff being unable to obtain a return of the balance of his deposit money, commenced an action in *January 1847*, in the Court of Exchequer, against Mr. *Thompson*, one of the managing committee of the Company, but was ultimately nonsuited in that action, on the ground that Mr. *Thompson* had not joined until after Mr. *Mowatt* had paid his deposit. The present action was then brought, and came on for trial at the sittings after *Trinity Term* in the year of our Lord 1850: when it was arranged that the trial should stand over till the result should be seen of an action which

had been brought by the managing committee of the Company against Mr. *McGregor*, the chairman of *The South Eastern Railway Company*, in respect of their undertaking before alluded to, and in which action the plaintiffs had obtained a verdict. The judgment signed by the plaintiffs in the action against the chairman of *The South Eastern Company* was afterwards reversed in the Exchequer Chamber, the Judges of which decided that the undertaking before alluded to was not binding either on *The South Eastern Company* or Mr. *McGregor*. *The South Eastern Company* and Mr. *McGregor* have repudiated any liability to *The Dover and Deal Company* or its managing committee.

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At the trial, the defendant took the following objections, which raised the question for the opinion of the Court.

1. That the contract (if any) to return the deposit on the terms contained in the circular accompanying the letters of allotment became merged by the execution by the plaintiff of the subscribers' agreement, the same being an instrument under seal.

2. That, assuming that the said deed did not operate as a merger, the plaintiff thereby authorized the directors to expend the deposits in the mode pointed out, so that the moneys in question never became moneys had and received to the use of the plaintiff.

3. That the letter of allotment, and the accompanying circular, amounted only to a proposal which never was accepted; or, if such letter and circular, or the banker's receipt, or scrip, amounted to a contract, they or one of them ought to have been stamped.

4. That the plaintiff cannot recover in respect of the

1854. shares subscribed for by Dr. *Elliott*, Mr. *Fielder* and
 MOWATT Mr. *Barnes*.

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5. That the letter of the plaintiff of the 18th *December*, 1846, is not a sufficient demand of interest within stat. 3 & 4 *W. 4. c. 42. s. 28.*, to entitle the plaintiff to recover interest on the deposits.

The Court are to draw such inferences of fact as a jury ought; and such inferences of fact as the Court think right are to be stated in any special verdict which may be framed.

The question for the opinion of the Court is: Whether the verdict for the plaintiff should stand, either wholly or in part; and, if so, for what amount; or whether a nonsuit should be entered, or new trial had.

The case was argued in last Term (*a*).

Willes, for the plaintiff. There is no distinction between the several sets of shares. In each case, by the circular, the allotment and the payment, there is a contract that the directors will return the whole deposit if the Act is not obtained. The money belongs to the plaintiff; and he is the proper party to sue for it. Even the beneficial interest is his; though it would be enough if he were a trustee for his nominees.

First, there can be no merger. The contract now sued upon is between the plaintiff and defendant: the subscribers' deed is not between the same parties, but between the several subscribers and the two trustees, Messrs. *Brook* and *Forrest*. And the contract in that deed is distinct from that sued on.

(*a*) *November 8, 9 and 10, 1853.* Before Lord *Campbell* C. J., *Cole-ridge* and *Wightman* Js. *Erle* J. was present during the earlier part of the argument on *November 9*.

Next, the contract is not superseded by that contained in the deed. The deed contains no release or waiver of liability. Nor was it contemplated that one should be substituted for the other: the execution of the deed by the plaintiff is one of the considerations for the contract sued on. That it does not affect the contract constituted by the circular, the letter of allotment and the payment of the deposit, was decided, in effect, by *Mowatt and Elliott's Case* (a). It was there held, by Lord Chancellor *Cranworth* and by the Lords Justices *K. Bruce* and *Turner*, that, on the winding up of this Company, the present plaintiff could not be required to pay a call, inasmuch as, between him and the directors, the directors were liable for the costs of winding up: and their Lordships held that the signature of the subscribers' deed did not alter this liability: Lord *Cranworth* said (b): "It was urged in argument that he" (the present plaintiff) "signed the deed after he had entered into the agreement. No doubt where there is an agreement, and in order to carry that agreement into effect the party executes a deed, the deed is that which is *primâ facie* to be taken as speaking the intention of the parties; but that was not what was meant here; it never was meant that the deed should be an embodiment of the agreement; on the contrary the agreement, the guarantee, was something entirely collateral to the deed. The directors said to Mr. *Mowatt*, 'If you will execute the deed, we will indemnify you;' he did execute the deed, and now they say, 'We are not the persons to indemnify you.' I think they entirely fail in that argument." [Lord *Campbell* C. J. Does the indemnity

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(a) 3 De G. M^cN. & G. 254.(b) 3 De G. M^cN. & G. 266.

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clause in the deed really create any relation which would not exist without it? Would not an agreement to return the money, if the Act was not obtained, be implied? And would not a claim on such implied agreement be answered by the fact that the money had been expended in attempting to obtain the Act? And is not that tantamount to an indemnity, up to the amount of the deposit?] That seems to be so: and the question therefore is, how far the express and unqualified agreement to return the money, in case the Act is not obtained, varies the liability. And, even if the indemnity clause in the deed can take effect, it must be enforced by a cross action. [*Wightman J.* Probably it was taken for granted that *The South Eastern Railway Company* would carry their agreement into effect.] That must have been so: and, had this taken place, the plaintiff would unquestionably have been entitled to recover back the whole deposit: and his rights can surely not be affected by the refusal of *The South Eastern Railway Company*: the act of that Company is not made a condition of the defendant's promise. According to the general policy of the law, the expence of an abortive attempt ought to fall on the projectors, as appears by *Walstab v. Spottiswoode (b)*. The form of deed seems to have been originally projected by the original directors with a view to their own indemnification; and then, in order to obtain subscribers, they offer, as one of the inducements to persuade parties to subscribe, an unqualified undertaking to return the deposit in the event of the Act not being obtained: this places the directors in the same position as the defendant in *Walstab v. Spottiswoode (a)*.

(a) 15 M. & W. 501.

Next, as to the stamp. It is true that, when a contract is made up of several writings, one of these must be stamped. But there is here no complete contract by writing: the terms of the circular and letter of allotment are accepted only by the plaintiff making the payment and executing the subscribers' contract and the Parliamentary agreement. In such a case no stamp is required; *Vollans v. Fletcher* (a). [Lord Campbell C. J. The language of the Stamp Act is: "whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument" (b).] The evidence must be of a contract in writing, whether or not writing be by law essential to the creation of such a contract. The same objection was taken in *Ward v. Lord Londesborough* (c), but was unsuccessful. It is true that there the plaintiff had not, as has been done here, signed the subscribers' agreement: but, according to *Clements v. Todd* (d), payment of the deposit placed him in the same position as if he had. *Willely v. Parratt* (e), *Edgar v. Blick* (g), *Drant v. Brown* (h), *Chaplin v. Clarke* (i) and *Moore v. Garwood* (k) are all authorities in favour of the plaintiff. In the case last mentioned the Court refused to presume, without express evidence, that a letter, which was not produced, but to which a letter produced was proved to be an answer, was so entirely on the same terms with the letter produced as to constitute with it a written agreement. Here the letter of allotment contained a condition

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(a) 1 *Exch.* 20.(b) Stat. 58 G. 3. c. 184. Schedule. Part 1. tit. *Agreement*.(c) 12 *Com. B.* 252.(d) 1 *Exch.* 268.(e) 3 *Exch.* 211.(g) 1 *Stark.* 464.(h) 3 *B. & C.* 665.(i) 4 *Exch.* 403.(k) 4 *Exch.* 681.

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avoiding the allotment if the money was not paid and the documents executed : that is a new term, and varies from the terms of a simple application : the application and allotment therefore constitute no contract at all : it is the payment alone that makes the letter of allotment other than unilateral.

Lastly, as to the interest. The question is, whether the plaintiff's letter of 18th *December* 1846 satisfies the condition imposed by stat. 3 & 4 *W. 4. c. 42. s. 28.*, "so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." The letter certainly does give notice of a demand from an earlier day: the plaintiff demands therefore too much: but he does demand enough; the less is contained in the greater. [Lord *Campbell* C. J. May it mean that he will not be contented with less than what he names? If he had named less, perhaps he would have been paid.] The interest is calculated, not from the earlier day, but from the date of the demand.

Byles, Serjt., *contra*. A distinction must be made between the shares assigned to the plaintiff and those allotted to his nominees. As to the latter, the shares not being transferable, the directors dealt only with the actual allottees: the Parliamentary contract and subscriber's agreement were to be, and in fact were, executed by them, not by the plaintiff, who must be considered only as making the payment for them; and they are the proper parties to maintain the action; the obligation to execute and the right to recover must be in the same persons. *Mowatt* would not, in respect of these shares, be bound by the indemnity clause in the deed.

The question as to the merger becomes unimportant upon either view as to the next question.

∴ The next question is, whether, if there was a contract anterior to the execution of the subscribers' deed, that contract is superseded by the deed. Now the agreement insisted on, to return the deposit, was no more than the law would imply; and the express contract therefore does not, in this respect, vary the position of the parties. Then the clause in the subscribers' deed provides for the indemnity of the directors, whether or not the Act shall be obtained; and there is power given to the directors to apply the funds for obtaining the Act. Now these terms are not required by the Parliamentary standing orders; of which the Court will take judicial notice; *Lake v. King* (a): the plaintiff might have refused to sign it; *Ashpitel v. Sercombe* (b): the parties, therefore, in executing the deed, were doing more than carrying out the supposed preexisting contract. They therefore, after such execution, stand in a legal relation to be determined by the deed. [Lord Campbell C. J. Suppose *The South Eastern Railway Company* had paid the expences, so as to enable the directors to return the deposit.] The money would then have been applicable to the return of the deposit. [Coleridge J. As money had and received. Lord Campbell C. J. Suppose the deposit had been all spent before *The South Eastern Railway Company* made the payment.] There would then not have been money had and received to the use of the allottees, unless there had been an express consent, by the directors, to hold the money so paid to the use of the allottees. The subscribers' deed authorized the directors to apply the deposits to the obtaining of the

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Act; and the previous contract did not controul this; *Watts v. Salter (a)*. In that case it was held that, in the absence of fraud, the plaintiff could not recover for money had and received, under circumstances similar to those of the present case, except that there the undertaking to return the money was implied, and not express as here. [Lord Campbell C. J. Is it quite clear that there was such an implied undertaking in that case?] It seems so, from *Nochels v. Crosby (b)*. [Lord Campbell C. J. In this case, the contract, under which the plaintiff says he is to have the money returned, contemplated the execution of the subscribers' deed.] It is not shewn that the deed contemplated by both parties was to be in these terms. If the plaintiff had not chosen to exchange the receipts for scrip, he need not have executed the deed: and the effect of the original contract seems to be that, if he stopped there, he was to have his money back on the failure to obtain the Act; but that, if he went on, executed the deed and took the scrip, then he was bound by the terms of the agreement. [Lord Campbell C. J. You must take it as if all was done uno flatu.] That is scarcely reconcileable with *Watts v. Salter (a)*. But, supposing the whole contemporaneous, some effect must be given to the indemnity clause in the deed; and the plaintiff's construction gives none. The original undertaking is to return the deposits themselves, not a sum equivalent to them: the deed expressly authorizes the application of the deposits, with a clause exempting the directors from loss. It is suggested that the indemnity clause may be carried into effect by a cross action; but the Court will so construe the whole as to avoid circuitry.

(a) 10 Com. B. 477.

(b) 3 B. & C. 814.

On the question of stamp, *Ward v. Londesborough* (a) is certainly an authority in favour of the plaintiff, so far as relates to the shares first allotted to him in his own name. As to the other shares, if the plaintiff contracted with the defendant at all, the contract was complete as soon as the directors, in answer to his written application (which must be understood to be an application on the terms of the first contract), sent the letter of allotment: there was then a complete contract, wholly in writing, requiring a stamp.

As to the interest, the letter of 18th *December* 1846 does not satisfy the condition of stat. 3 & 4 *W. 4. c. 42. s. 28.* That is a statutory condition: "so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." The letter claims the interest from another date. The intention of the statute was that the party receiving the notice should be informed what interest was payable: it is no answer to this to say that the less is included in the greater: the demand of the greater frustrates the object of the Act. The analogy of a prior demand in the case of a tender is applicable: if too much is demanded it is no demand. Besides, the letter does not state down to what time the interest is claimed: the claim should be "until the term of payment:" it rather seems that the claim is meant to be down to the date of the demand.

Willes, in reply. *Watts v. Salter* (b) is no authority in a case where, as here, the execution of the deed is itself a part carrying out of an agreement which expressly guarantees the repayment of the deposit. In *Ashpitel v. Sercombe* (c) the decision was that the plaintiff might

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(a) 12 *Com. B.* 252.(b) 10 *Com. B.* 477.(c) 5 *Exch.* 147.

1854. recover the deposit although he had not signed the agreement: that has no application here. And, further,ⁿ it is manifest that the deed here was what the letter of allotment contemplated: no other deed is shewn; and this deed is prepared on or about 1st *January* 1846; but the application for shares is not till 26th *January* 1846. If a cross action were brought, it would be stopped in equity. The doctrine of avoiding circuity of action applies at law only when the parties to the two cross contracts are the same. This doctrine is relied upon in the third reason given by the judges in *Salmon v. Webb and Franklin (a)*. As to the stamp: there can be no distinction between the two sets of shares. If the plaintiff can recover at all in respect of the second set, it is because the contract is wholly his; and then the contract is made up in part of that which is not written, as in the case of the other shares.

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Cur. adv. vult.

Lord CAMPBELL C. J., in this term (*January* 13th), delivered the judgment of the Court.

Having considered this case, and examined all the authorities cited during the argument, we are of opinion that the plaintiff is entitled to recover.

He seems clearly to have a *prima facie* case, if the deed is not taken into consideration; for, although the sum sought to be recovered was spent by the provisional directors in the promotion of the scheme, there is here an express undertaking, in the event of the bill not being obtained, to return the whole of the deposits, *without deduction*. If the bill was introduced into Parliament, some expense must have been incurred by

(a) 3 *H. L. Ca.* 510, 518.

the directors, which, without the undertaking, they might have deducted from the deposits, the bill being lost: but the undertaking shews that the expense was to be borne by the directors, and not to be thrown upon the scrip-holders.

We are now to see the effect of the deed, coupled with the undertaking of *The South Eastern Counties Railway Company*, and the dealings between that Company and the provisional directors of the *Deal* and *Dover* Company. Looking merely to the letter of allotment and the deed, the deed would justify the directors in applying the deposits to the promotion of the scheme; and the amount so applied by them could not be recovered back by the scrip-holders. But the contract between these parties is to be collected from all the documents and facts stated in the special case. And this contract, we think, was, that, in the events which have happened, the whole of the deposits should be returned without deduction. Due weight must be given, not only to the express undertaking by the directors, but to the undertaking of *The South Eastern Counties Railway Company*. This is referred to in the circular, and is made the foundation of the undertaking of the *Deal* and *Dover* directors to their scrip-holders. If *The South Eastern Counties Railway Company* had performed their undertaking, it was admitted in the argument that this action would be maintainable. But surely the directors took upon themselves the risk (whatever it might be) of *The South Eastern Counties Railway Company* not performing their undertaking. The undertaking of the directors in the circular is not qualified by that or any other contingency. In the action against *The South Eastern Counties Railway*

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Company, the decision of the Court of Exchequer Chamber, by possibility, may be reversed by the House of Lords; and, at any rate, the *Deal* and *Dover* directors seem to be the parties to suffer, if they have negligently entered into an invalid contract with third parties, which they held out to be sufficient to justify them in absolutely undertaking to return the whole of the deposits without deduction.

But various objections were made at the trial, on which the opinion of the Court is desired.

1st. That the contract to return the deposit on the terms contained in the circular became merged by the plaintiff's execution of the deed. We do not think that there was, first, one contract by the allotment and the payment of the deposit, and, then, another by the deed. It appears to us that all the documents enter into one contract, and that they have the same effect as if they had all been signed and delivered *uno flatu*. This is not a case in which the doctrine of a simple contract merging in a specialty can apply; for the deed is not between the same parties as the simple contract; and the subject matter contracted for is different.

Secondly. It is said that, at all events, the deed deprives the plaintiff of his remedy, by authorizing the directors to prosecute the scheme with the deposits, and agreeing to indemnify them. This certainly would be so, were it not for the express undertaking by the directors to return the deposits without deduction, in consequence of the expected indemnity from *The South Eastern Counties Railway Company*. But this undertaking distinguishes the present case from the cases relied upon by the defendant. Promises are to be construed according to the sense in which the promisor

must be supposed to wish and to believe that the promise should be understood by the promisee; and we cannot doubt that the directors of *The Deal and Dover Company* wished and believed the allottees of their shares to understand that, after they had paid the deposit, obtained the banker's receipt, exchanged it for the scrip certificate, and executed the deed, they were sure to have the whole deposit returned, if the bill should not pass. The deed which the plaintiff did execute had been prepared before the circular was issued; and it is evidently the deed referred to in the letter of allotment. It cannot, therefore, be supposed that the directors intended that the plaintiff, by executing that deed (he being bound to execute it before he could have the scrip certificate), was to lose all benefit from their express undertaking, which they gave as an inducement to him to become a shareholder.

The next objection is upon the stamp laws. But it is allowed that the case of *Ward v. Lord Londesborough* (a), in the Common Pleas, referred to in the argument, is an express authority to shew that, as far as the five hundred shares allotted to the plaintiff in his own name are concerned, no stamp was necessary. We entirely approve of that decision; and, further, we think that, for this purpose, no distinction can be made between these shares and the shares allotted to the nominees of the plaintiff for his benefit, there being no perfect contract evidenced by writing with respect to any of them. This seems in conformity with what is laid down by *Patterson J.*, in delivering the judgment of the Exchequer Chamber in *Chaplin v. Clarke* (b).

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(a) 12 Com. B. 252.

(b) 4 Exch. 408.

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The only remaining point is as to the interest. The demand in the plaintiff's letter of 18th *December* 1846 does not follow the very words mentioned in stat. 3 & 4 *W. 4. c. 42. s. 28.*: but we think it a sufficient compliance with that statute, as it gives abundant notice to the defendant, that, if he keeps the plaintiff's money longer in his hands, he will be held liable for interest upon it from the time he is served with the demand till the time of payment of the principal.

Upon the whole, we are of opinion that the verdict for the plaintiff for principal and interest ought to stand.

Judgment accordingly.

Wednesday,
January 25th.

The QUEEN *against* The Overseers of the
Township of MANCHESTER.

The treasurer of a county court was lessee, under stat. 9 & 10 *Vict. c. 95. s. 48.*, of a building used for the court house, and for other purposes of the Act, exclusively.

Held: that neither the treasurer, nor any one else, had such an occupation of the building as to be liable in respect thereof to poor rate, under stat. 43 *Eliz. c. 2.*

ON appeal by *H. T. Hulton*, treasurer of the county court of *Lancashire* holden at *Manchester*, against a rate for the relief of the poor of the township of *Manchester* in *Lancashire*, the Sessions amended the rate by striking out the whole of the assessment after mentioned, subject to a case of which the material parts were as follows.

The premises rated consist of a building situate within the township of *Manchester*, called the county court of *Lancashire*, holden at *Manchester*, of which the appellant is to be deemed the person liable to be rated if any person or persons whatever is or are liable to be rated in respect thereof.

The following is a copy of the assessment appealed against, so far as material to the question decided.

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Name of Owner.	Name of Occupier.	Description of Property rated. <i>Nicholas Croft.</i>	Gross Estimated Rental.	Rateable Value.
<i>Sir Oswald Mosley.</i>	<i>H. T. Hutton.</i>	County Court.	£300.	£166.

Of the grounds of appeal, the 3d, 4th and 5th only are material. They are as follows.

“Third: That the premises, for or in respect of which I am rated and assessed as above mentioned, are used for public purposes only; and that I am not a beneficial occupier thereof.

“Fourth: That the said premises” “are not by law liable to be rated or assessed in and by the said rate or assessment; inasmuch as they are used for the sole purpose of transacting the business of a county court, established and carried on under and according to the provisions of an Act” &c. (9 & 10 *Vict. c. 95.*).

“Fifth: That the said premises” “are not by law liable to be rated to the relief of the poor of the said township.”

It is to be taken as admitted: That the said building is rented exclusively for the purpose of transacting the business of a county court, established and carried on under and according to the provisions of stat. 9 & 10 *Vict. c. 95.* That the appellant is treasurer of the said county court, under the provisions of the said Act. That the appellant, as such treasurer, has been and is the lessee of the said building in trust for the purposes of the said Act of Parliament, according to the provisions of the 48th section thereof. That all fees received by the officers of the said county court are duly dis-

1854. posed of according to the provisions in that behalf of
The QUEEN the said Act. That the appellant is in no way con-
v. nected with or interested in the said building except
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That the district of the said county court includes other townships besides the township of *Manchester*, and, amongst others, the following townships, namely *Manchester, Ardwick, &c.* (naming 28 others).

If this Court shall be of opinion that either the appellant or any person or persons whatever is or are liable to be rated in respect of the said premises, then the said order of Sessions amending the rate is to be set aside, and the rate is to be confirmed: if otherwise, the same order to stand confirmed, and the rate to be amended accordingly.

Cowling, in support of the order of Sessions. The building is used for public purposes only: there is no beneficial occupier. Its utility is confined to the litigants subject to the jurisdiction. By stat. 9 & 10 *Vict. c. 95. ss. 2., 56.*, districts are to be assigned for which county courts are to be held, and the judge is to hold them in the district at such places as the Crown shall have ordered. By sect. 48 the treasurer, appointed under sect. 23 by the Commissioners of the Treasury, and paid by salary out of the consolidated fund, is, when necessary, to hire or otherwise provide messuages and lands fit for holding the court and for the offices thereof; and they are vested in him "in trust for the purposes of this Act." By sect. 51 he may borrow money, to be repaid out of the general fund provided by the Act, under sect. 52, from the court fees. There is nothing to make a beneficial occupation by any one. (The Court then called on the other side.)

Pashley, contra. It cannot be said that the property is of no value to any one: the actual litigants, perhaps all entitled to have recourse to the court, are benefited by the building. It is the common case of a trustee rated for a beneficial cestui que trust. [Lord Campbell C. J. But must not the benefit be pecuniary, or something of the kind, something specifically profitable?] It is not necessary that the trustee himself should have a beneficial interest; *Birkenhead Dock Trustees v. Birkenhead Overseers* (a); nor that the parties ultimately benefited should have a specific pecuniary interest; *Regina v. Wallingford Union* (b), *Governors of the Bristol Poor v. Wait* (c). The last two cases cannot be distinguished from the present; for there can be no distinction between the benefit accruing to a particular body of rate-payers and that accruing to all resident within the local limits of a particular jurisdiction. A fund is provided, from the fees of the Court, out of which the expences of cleaning, lighting and warming the court house are defrayed; sect. 55. [*Wightman J.* If any liability to the rate could be shewn, the rate might be defrayed out of that fund: that is all.] Where any benefit arises, an occupation by a trustee is enough to raise the liability, within stat. 43 *Eliz. c. 2.*; *Regina v. Harrogate Commissioners* (d), *Rex v. The Mayor, &c. of York* (e). If the treasurer let the building it would clearly be liable. It is incumbent on those who deny the liability of premises undoubtedly valuable to shew something in the statute giving an exemption.

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(a) 2 *E. & B.* 148.(b) 10 *A. & E.* 259.(c) 5 *A. & E.* 1.(d) 15 *Q. B.* 1012.(e) 6 *A. & E.* 419.

1854. Lord CAMPBELL C. J. I can find no enactment making any one liable in respect of those premises: possibly such an enactment might have been politic: but, in the absence of any such, it must be shewn that the trustee has an occupation beneficial either to himself or to others for whom he is trustee. Mr. *Pashley*, I think, can scarcely have meant to argue seriously that such a benefit exists in respect of the fees paid by the suitors and applicable to the hire of the court, and to the keeping it in a fit state for being used. That benefit is quite unconnected with any occupation. Who then are the cestui que trusts? Surely the Queen's subjects in general cannot be so considered, as deriving a specific benefit. I find no person occupying beneficially within stat. 43 *Eliz. c. 2.*, and am therefore of opinion that there is no liability to rate.

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COLERIDGE J. I am of the same opinion. It is not material whether the premises were rateable before they were used in this way: we are to look to the nature of the present occupation. The present occupier is the treasurer. Does he occupy beneficially for himself? The litigants do not occupy at all. Beneficial occupation exists when something is raised which, to some extent, is enjoyed by the occupiers: but there is nothing of the sort here: and that is what distinguishes the case from *Regina v. Harrogate Commissioners* (a) and others which have been mentioned.

WIGHTMAN J. I am of the same opinion. Mr.

(a) 15 Q. B. 1012.

Pashley has not shewn that any one derives any profit at all as occupier: and the case therefore is not within stat. 43 *Eliz. c. 2*.

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(No fourth Judge was present.)

Order of Sessions affirmed.

The QUEEN *against* BENNETT and others.

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January 25th.

DOWDESWELL, in last Term, obtained a rule calling on the prosecutor to shew cause why the allowance of *Edward Murrell* Esquire, auditor of the Gloucestershire and Monmouthshire Poor Law Audit District, of the sums of 2*L*. 8*s*. 9*d*., 54*L*. 13*s*. 8*d*. and 13*L*. 11*s*. 7*d*., charged in the accounts of the *Westbury upon Severn* Union, in Gloucestershire (brought up by certiorari (a)), should not be quashed or disallowed, and why the said sums should not be paid to the said common fund by the township of *East Dean* in the said Union. On notice to the auditor and the overseers of *East Dean*. By the affidavits on which the certiorari was obtained it appeared that the extraparochial parts of the *Forest of Dean*, in Gloucestershire, were, previously to 1842, wholly exempted from the operation of the statutes for the relief of the poor, and no provision existed for the maintenance or settlement of the poor therein. That by stat. 5 & 6 *Vict.*

Stat. 11 & 12
Vict. c. 110.
s. 3. (which enacts that the costs incurred for paupers rendered irremovable by stat. 9 & 10 *Vict. c. 66.* shall, when the parish is comprised in an Union formed under stat. 4 & 5 *W. 4. c. 76.*, be charged to the common fund of such Union) is inapplicable to the case of a pauper who is irremovable by his having no known settlement, although he has resided without interruption for five years, so as to be irremovable if settled elsewhere.

(a) Stat. 7 & 8 *Vict. c. 101, s. 35.*

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c. 48. (a) the extraparochial parts of the *Forest of Dean* were divided into two townships, by the names of *East Dean* and *West Dean*; and that, by sect. 2, it was enacted, that each of the said townships should thenceforth and for ever, from and after the passing of the said Act, maintain its own poor, and, for the purposes of the Act, be vested with such and the like powers, privileges and immunities, and be subject to the same laws, authorities and regulations, as other townships in *England* and *Wales* maintaining their own poor. That, pursuant to the said Act, afterwards, in 1843, the Poor Law Commissioners added the said township of *East Dean* to the said *Westbury upon Severn* Union (b). That *Thomas Dawe*, a pauper, was born in that extraparochial part of the *Forest of Dean* called the township of *East Dean*, in 1821, and had never gained a settlement in any other township, parish or place; and that he had never gained a settlement in that township. That he had lived and inhabited in the same part of the *Forest of Dean* the whole of his life, and, whilst so inhabiting, had become and been, with his wife and family, chargeable to and relieved with out door relief by the township of *East Dean*, during the half year ended 25th day of *March* 1853. That his father and mother were inhabitants of, and resided, so far as could be ascertained, in the same extraparochial part of the said Forest; and that there was no evidence, and it could not be ascertained, that either of them, or any of their parents, had ever ob-

(a) "To provide for the relief of the poor in the *Forest of Dean* and other extraparochial places in and near the hundred of *Saint Briavel's* in the county of *Gloucester*."

(b) Sect. 3.

tained or were entitled to any settlement in any parish or place whatsoever. That the sum expended by the said township of *East Dean* in the out door relief of the said *Thomas Dawe* during the said half year ended 25th day of *March* last amounted to 2*l.* 8*s.* 9*d.*, and that sum formed part of and was included in the item of 363*l.* 9*s.* 4½*d.* charged in the book of account of the said Union to the common fund of the said Union.

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That *Joseph Bennett* and two others, being guardians of the poor of the parish of *Westbury on Severn*, forming part of the said Union, and ratepayers of the said parish, objected on the audit to the said charge of 2*l.* 8*s.* 9*d.* to the said common fund, contending that it should be charged to the township of *East Dean*.

The affidavit also set out objections made in respect of various sums which were disbursed for the relief of other paupers residing in *East Dean*, and which were charged by the auditor to the common fund of the Union under the same circumstances. Notice of application for the certiorari, on these grounds, had been given to the auditor. The auditor returned the items; and added that his reason for allowing them, stated and declared in the book of accounts, was: "because the said *Thomas Dawe* and the said other poor persons, having resided in *East Dean* more than five years before they were relieved as above mentioned, had not been settled in such township, were in my judgment irremovable therefrom, by reason of an Act" &c. (9 & 10 *Vict. c. 66.*); "and therefore, and also because it did not sufficiently appear, nor was it shewn to me, that the said *Thomas Dawe* and the said other poor persons had not respectively settlements either by themselves or derived by them respectively in some parish or township

1854. other than the said township of *Dean*, that the costs
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 v. the common fund of the said Union by virtue of the 3d
 BENNETT. section of the 11th & 12th *Victoria*, Chapter 110."

Alexander and Phipson, for the auditor, and *R. Hall*, for the township of *East Dean*, now shewed cause. The sums in question were properly charged upon the common fund of the Union. Stat. 11 & 12 *Vict. c. 110. a. 3.* enacts that, after 30th *September* 1849, all the costs incurred in the relief of a pauper who, "not being settled in the parish where he resides, shall, by reason of some provision of" stat. 9 & 10 *Vict. c. 66.*, "be or become excepted from the liability to be removed from the parish where he resides, shall, where the said parish shall be comprised in any" union founded under stat. 4 & 5 *W. 4. c. 76.*, "be charged to the common fund of such union." Now it is clear that the paupers never were settled in *East Dean*, their place of residence, which was extraparochial until the passing of stat. 5 & 6 *Vict. c. 48.*; the question, therefore, is, Whether, having no settlement in the parish in which they reside, they are, further, irremovable under stat. 9 & 10 *Vict. c. 66.* [Lord *Campbell C. J.* Is it contended on the other side that they do not belong to the category of the irremovable, but rather of the unsettled?] There appear no grounds for such an objection. The auditor states, in his return to the writ, that no evidence was laid before him to shew that they had no settlements elsewhere. [Coleridge J. According to your argument, the expenses incurred in the relief of all paupers who have resided for five years in *East Dean*, and have no settlement elsewhere, would be chargeable upon the common fund

of the Union.] The argument certainly goes to that extent. [Lord *Campbell* C. J. The irremoveability referred to in stat. 11 & 12 *Vict. c. 110. s. 3.* is only irremoveability under the provisions of stat. 9 & 10 *Vict. c. 66.* Does the present case come within the latter statute?] It would appear to do so: it cannot be contended that the rules laid down in that statute as to irremoveability are not to apply except where the place of settlement is known. [*Coleridge* J. A pauper is removeable from a parish, not because he is not settled in that parish, but because he is settled in another.]

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Pashley and *Dowdeswell*, *contra*, were stopped by the Court.

LORD CAMPBELL C. J. The attempt to throw these expenses upon the common fund of the union is very unjust. The expenses incurred in the relief of paupers who are not settled in the parish in which they reside are chargeable upon the common fund of the Union only where the paupers are irremoveable under stat. 9 & 10 *Vict. c. 66.* Here they are irremoveable, but not by reason of that statute; they are irremoveable without it. The auditor was clearly wrong in his decision; and the rule must be made absolute.

COLERIDGE J. I am of the same opinion. The whole question here is whether the auditor has construed stat. 11 & 12 *Vict. c. 110. s. 3.* rightly. I think it is clear that the present case is not within that statute. Would the paupers here have been removeable to some other place, but for an uninterrupted five years' residence? Clearly not; and therefore the auditor was wrong in

1851. changing the expenses incurred in their relief to the
 The QUEEN common fund of the Union.
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 BENNETT. WIGHTMAN J. The Act clearly does not apply.

(No fourth Judge was present.)

Rule absolute, with costs to be paid by the
 overseers of *East Dean* (a).

(a) Reported by Francis Ellis, Esq.

Wednesday,
 January 25th.

GAMBIER, appellant, against The Overseers of the
 Poor of the parish of LYDFORD in DEVONSHIRE,
 respondents.

Under stat.
 13 & 14 Vict.
 c. 39, the
 directors of
 convict prisons

hired land and buildings, to be used as a convict establishment for the confinement and employment of convicted prisoners.

Part of the lands were occupied as a prison, a building within which prisoners were confined, and within which were also a house and garden occupied by the governor, and also dwellings occupied by other officers of the establishment; no more was occupied by the governor or officers than was necessary for the proper discharge of their duties and the adequate accommodation of their families. The directors assigned the houses, &c. to them; and they had no discretion in this respect. Held: that no one was rateable in respect of the prison or any other of the matters above mentioned.

Within the precincts of the prison was a coach house and stabling, occupied by the governor, of an extent greater than was necessary to enable him to perform his duties. Held: that the governor was rateable in respect of this excess.

Within the precincts was a building occupied as a canteen for the sale of beer to the prison officers. No profit was derived therefrom beyond what was sufficient to pay the wages of a man who supplied the beer. Held: that the occupier was rateable.

Outside the precincts, but in the same parish, were buildings occupied by the chaplain of the prison, by the medical officer, and persons employed in the prison: none occupied more than was necessary for the discharge of their duties and the adequate accommodation of their families. The dwellings were assigned to them by the directors; and they had no discretion as to their place of residence. Held: that these occupiers were rateable. Per Lord Campbell C. J. and Wightman J.; dissentiente Coleridge J.

Part of the premises outside the prison were occupied by a grocer, who supplied goods to the residents of the convict establishment and others, on his own account. Held: that the occupier was rateable.

Part of the premises consisted of land outside of the prison, within the same parish: upon this the convicts were employed; and the proceeds were disposed of exclusively for the benefit of the establishment. Held: that the occupation of such land imposed a liability to poor rate.

was made, in which *James Mark Gambier*, Esquire, the governor of the Convict Prison at *Dartmoor* in the said county, was rated and assessed as follows.

The case set out the entry: the only material parts were the following.

Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Gross estimated Rental.			Rateable Value.		
				£	s.	d.	£	s.	d.
Governor of Convicts.	Prince of Wales.	Land and Buildings.	<i>Rundlestone.</i>	30	0	0	20	0	0
The Governor of Convicts.	Government, or Prince of Wales.	Land and Buildings.	For the whole of the Property rented by the Government of the Prince of Wales, consisting of houses, barracks, Prison of War offices, and land on <i>Dartmoor</i>	280	0	0

Gambier having appealed against the rate to the Sessions, and notice of such appeal having been given, a case was, by consent of parties, and by order of *Erle J.*, stated for the opinion of this Court, pursuant to stat. 12 & 13 *Vict. c. 45. s. 11*. The material parts of the case were as follows.

The “land and buildings” secondly mentioned in the assessment are rented by the Directors of convict prisons from the Duchy of *Cornwall*, under a lease dated 31st *December* 1852, for a term of ninety nine years from 29th *September* 1850, subject to a yearly rent of 234*l.* 10*s.*, and, after the expiration of the first twenty two years of the said term, subject to certain additional rents for the land which should have been brought into cultivation, and subject also to certain royalties on peat &c. which should be raised or gotten, and which, or the products of which, should be carried off the premises whether for sale or otherwise: which lease was granted on the surrender of a former lease of 30th *June* 1851.

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1854. The lease of 31st *December* 1852 states that the
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LYDFORD. buildings and part of the waste land thereby demised
are to be used as a convict establishment, for the confinement and employment of convicted prisoners, in (among other occupations) the reclaiming and cultivating the lands thereby demised, pursuant to covenants therein contained, and for purposes connected therewith, and contains a covenant by the lessees to use all the premises thereby demised as and for a convict establishment and purposes connected therewith, and not for any other purpose whatsoever, unless with the consent of the lessor. The directors to expend, within five years from the commencement of the term, the sum of 15,000*L*. in substantially repairing the buildings upon the demised premises; to reclaim, improve and cultivate so much of the lands as should be capable of being reclaimed, improved and cultivated; and the term to be determinable on the 29th day of *September* 1854, or on the 29th day of *September* in any subsequent year, by either party giving twelve months' notice to determine the same. The lease also contains a power for the lessor, in certain events, at any time after 29th *September* 1872, without notice, to reenter upon and resume possession of part of the waste land thereby demised, and also determine the lease of the "minister's house" and appurtenances on 29th *September* 1854, or on 29th *September* in any subsequent year, on giving twelve months' notice.

The prison and buildings connected therewith have been used by the directors as a convict establishment, pursuant to the terms of the lease of 30th *June* 1851, from the commencement of the said term until the surrender of that lease, and thenceforth to the present

time, pursuant to the terms of the said mentioned lease : and the land included in both the existing leases has during all that time been occupied by the directors, together with the prison ; and the convicts have been employed in the improvement and cultivation thereof ; and about fifty acres have been brought into a good state of cultivation ; and more is in the course of being reclaimed and cultivated. The cost of the improvements and cultivations necessary to fit the establishment for the reception of convicts, and of the erection of all new buildings, have been paid out of the Home Office convict estimates.

The rent and taxes (including property tax, highway rates, tithes and poor rates), and also the salary of the governor, which has been fixed at 500*l.* per annum, have been and are paid out of the same fund.

The produce of the land (part of which has been converted into a kitchen garden for the use of the establishment) is either consumed in the establishment or sold ; the amount received from such sales being placed to the service of the prison expenditure, thus reducing the amount drawn from the convict estimates. The peat dug from off the land is consumed as fuel in the prison, and also in the manufacture of gas for prison consumption. No part of the produce of the land has been sold or disposed of otherwise than as above mentioned.

A house within the precincts of the prison, and a small strip of land occupied therewith as a garden, have been assigned to and are occupied by the governor of the prison, as "quarters," together with stables, coach-house and outbuildings used for the governor's house, two ponies, and pony carriage. The governor is required

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by the Secretary of State to keep one horse for use on the public service. The governor's house consists of a drawing room, a dining room, a kitchen, four bed rooms, and two attics. The quarters occupied by the deputy governor, the assistant chaplain and the steward, each containing a somewhat less number of rooms than the governor's quarters, are also situate within the precincts of the prison, and are occupied by those officers respectively. All the above quarters are occupied rent free.

At some little distance from the building of the prison, and not connected with it by boundary wall, or otherwise, is a row of eight cottages, which, if rateable, ought to be assessed at 90*l.* a year. Persons employed in the prison occupy these cottages; and for some of them the occupiers pay rent; and in other cases the value of the occupation is taken into account and diminishes the wages paid to such occupiers.

Near these cottages, and also unconnected with the building of the prison, is a dwelling house, of a rateable value of 20*l.* a year, occupied by the "medical officer" of the establishment.

And, at a little distance from this house, is a house and garden occupied by the chaplain of the establishment; and, if rateable, is of the rateable value of 35*l.* a year.

In addition, a great part of a building called "the barracks," situate at a short distance from the prison, has been assigned as quarters for the subordinate officers and their families: and another part of these barracks is occupied by a grocer, who resides and carries on his business there on his own account, supplying goods to the residents in the convict establishment, and to others who deal with him. The last mentioned officers or

some of them pay rent for their quarters to the directors; whilst in other cases it is calculated in their wages similar to the cottages in the row. Each officer occupies one or two rooms according to the number of his family.

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No more rooms are occupied by the governors or by the other officers than are necessary for the proper discharge of their duties as officers of the prison, and for the adequate accommodation of the families of such of them as are married men and have families. But the coach-house and extent of stabling of the governor are not necessary to enable him properly to discharge his duties. The several officers, however, have no discretion in respect of the houses and apartments assigned to them, respectively; such houses and apartments being so assigned by the directors of prisons for their occupations as such officers.

A part of the building within the prison walls is occupied as a canteen by one *Samuel Piper*, for the sale of beer to the prison officers, no profit being derived therefrom beyond what is sufficient to pay the wages of a man who supplies the beer.

All the rents which are paid by any of the officers, and the proceeds of the land, are placed to the service of the prison expenditure, thus reducing the amount drawn from the convict estimates.

The land and buildings demised by the said lease contains in the whole thirty three acres, or thereabouts.

The land and buildings called *Rundlestone* is situate apart, and at a distance of half a mile from the prison and barracks before mentioned, and consists of 8 acres of meadow land, worth a yearly rent of 1*l.* 5*s.* per acre, 50 acres of rough land, worth a yearly rent of 5*s.* per

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acre ; and 145 acres of waste land, worth a yearly rent of 1s. per acre ; and of a small farm house : and these premises are rented by the directors of convicts' prisons from the Duchy of *Cornwall*, under a lease dated 7th *May* 1852, for a term of thirty one years from 29th *September* 1850, subject to a rent of 30*L.* a year, and to certain royalties for all peat &c. which, or the products of which, should be sold, or disposed of otherwise than for the use of the convict establishment. The directors employ convicts of the establishment in clearing and cultivating this farm ; and all its proceeds have been used or disposed of for the benefit of the establishment and not otherwise.

The question for the opinion of this Court was stated to be :

Whether, under the circumstances above stated in respect of the "land and buildings" included in the rate, or any and what part thereof, any person is rateable to the relief of the poor. If the Court shall be of opinion that no one is rateable to the relief of the poor in respect of the occupation of any part of the said land and buildings, then it is agreed that the said rate shall be amended by striking out the assessment on the appellant. If the Court shall be of opinion that, in respect of the occupation of the said lands and buildings, or any part thereof, any one is rateable as aforesaid, then the assessment on the appellant is to stand to such extent as the Court may think fit : and, if the parties should differ as to the amount at which the rateable part of the said lands and buildings ought to be assessed, the question of such amount shall be disposed of by the Court itself naming a sum, or otherwise as the Court may direct.

In either case such costs are to be paid as this Court shall adjudge: and it is agreed that judgment shall be entered by the Sessions accordingly.

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Pashley, for the respondents. First, as to the prison. It is found that the coach-house and extent of stabling, occupied by the governor within the walls, are "not necessary to enable him properly to discharge his duties." The governor therefore is a rateable occupier; *Rex v. Terrott* (a). And, as he occupies the whole together, he must be rated for the whole, as in that case. Indeed it is not necessary to rely upon the excess, in order to shew that he is rateable for all that he occupies in the prison. In *Regina v. Temple* (b) it was held that premises, hired by the Privy Council for the use of a normal school, on which the principal and masters resided, were subjects of rate. [Lord Campbell C. J. There is a difference of use, at any rate, in the two cases. There the parties went voluntarily for instruction: here the building is devoted to persons suffering the sentence of the law.] The Court has repeatedly, as in *Regina v. Sterry* (c), expressed regret that the mere occupation of valuable property has not, without any distinction as to public and private purposes, been deemed sufficient to constitute a rateability. [Coleridge J. It may be said that such an expression of regret shews how strongly it was felt that the objectionable rule was fixed. Lord Campbell C. J. You had better clear the way by discussing, in the first place, the question whether any one is rateable for that which is mere prison.] Any one who occupies is so. [Lord Campbell

(a) 3 *East*, 506.(b) 2 *E. & B.* 160.(c) 12 *A. & E.* 84. 92.

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C. J. What profit does the prison produce?] The case is like that of a lunatic asylum, which is rateable in the hands of a private person, or of the normal school in *Regina v. Temple* (a). The Privy Council, in the case last mentioned, were much in the same position as the directors here, under stat. 13 & 14 *Vict. c. 39*. The latter are not servants of the Crown, but "public officers appointed to perform certain duties assigned to them by the Legislature," according to the distinction laid down by Lord *Lyndhurst* C. in the case of *The Commissioners of Woods and Forests* (b). The leading case in favour of the non-rateability of property occupied for a public purpose is *Rex v. The Commissioners of Salter's Load Sluice* (c). But that case, so far as it can be supported, is explained by this Court in *Birkenhead Dock Trustees v. Birkenhead Overseers* (d), on the ground that the Court adopted the construction that the direction of the local Act "amounted to a prohibition to apply the tolls to the payment of poor's rate:" and the same explanation is given by Lord *Campbell* C. J. in *Regina v. Temple* (e). In *Rex v. St. Luke's Hospital* (g) the hospital was held not rateable because it was vested in trustees who had no interest; but that principle has been disallowed in later cases; *Rex v. The Mayor, &c. of York* (h), *Regina v. Harrogate Commissioners* (i). [Lord *Campbell* C. J. That is, a trustee who occupies but takes no benefit may be rated if his cestui que trust takes a benefit.] A profitable occupation, though in the

(a) 2 *E. & B.* 160.

(b) *Viscount Canterbury v. The Attorney General*, 1 *Phill. R.* 306. 324.

(c) 4 *T. R.* 730.

(d) 2 *E. & B.* 148. 157, 8.

(e) 2 *E. & B.* 168.

(g) 2 *Burr.* 1053.

(h) 6 *A. & E.* 419.

(i) 15 *Q. B.* 1012.

carrying out of a public duty or a charitable trust, creates liability to rate; *Rex v. Munday* (a), *Rex v. Catt* (b), *Rex v. Hurdis* (c), *Regina v. Ponsonby* (d); though it is otherwise where there is no occupation at all except what consists in the mere appropriation to the public purpose; *Lord Amherst v. Lord Sommers* (e), *Regina v. Shee* (g). [*Wightman J.* referred to *Regina v. Shepherd* (h).] Several questions were there raised: the first discussed seems to have been whether the gaoler, matrons, &c. were occupiers; *Regina v. The Justices of Worcestershire* (i) was relied on, where it was held that the justices of a county were not liable for buildings which they held, to be used as a county hall, courts of justice, and judges' lodgings. [Lord Campbell C. J. Possibly it may not be too late to reconsider the cases: but certainly in *Regina v. Shepherd* (h) it was taken for granted that there could be no rateability in respect of a prison.]

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At all events, the governor is rateable so far as the occupation of the coach-house is not necessary for the discharge of his duties; *Regina v. Terrott* (k).

The rateability in respect of the occupation of the house by the grocer will probably not be contested.

As to the cottages and other dwellings, including the barracks, on the outside of the prison: the occupiers, though they reside for the purpose of discharging duties in the prison, are beneficial occupiers, as much as they

(a) 1 *East*, 584.

(b) 6 *T. R.* 332.

(c) 3 *T. R.* 497.

(d) 3 *Q. B.* 14.

(e) 2 *T. R.* 372.

(g) 4 *Q. B.* 2. See 2 *E. & B.* 173.

(h) 1 *Q. B.* 170.

(i) 11 *A. & E.* 57.

(k) 3 *East*, 506.

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would be if the dwellings were in a parish different from that in which the prison stands. Whether they pay rent, or have the amount of rent deducted from their salary, must be immaterial as to rateability. [*Coleridge J.* Is the case different from that of a gamekeeper who is allowed to occupy a house, in lieu of part of his wages, and who yet, if he occupies merely for the purpose of performing the service of gamekeeper, is held not to be an occupier, the occupation being that of the master(a)?] The question is whether there is here an occupation under stat. 43 *Eliz. c. 2*. The case of the chaplain is a fair instance: how can he be said not to occupy beneficially, because he is obliged to reside near the prison?

The canteen is unquestionably the subject of beneficial occupation.

As to the land, there is nothing to shew that it does not produce profit. The case therefore falls within *Governors of the Bristol Poor v. Wait* (b) and *Regina v. Wallingford Union* (c). It can make no difference whether the land is occupied in this way, or whether the directors let it to a farmer who contracts to employ convicts upon it.

Sir *A. J. E. Cockburn*, Attorney General, contra.

As to the prison itself, the exemption from rate is established by *Regina v. Shepherd* (d). And, so far as it is occupied by officers exclusively for the performance of their duties, they cannot be rateable: and this includes reasonable accommodation for their families according to their station in life. [*Lord Campbell C. J.* That is so, certainly.]

(a) See *Rex v. Kelstern*, 5 *M. & S.* 136.

(c) 10 *A. & E.* 259.

(b) 5 *A. & E.* 1.

(d) 1 *Q. B.* 170.

With respect to the excess of accommodation enjoyed by the governor, it seems that *Rez v. Terrott* (a) is conclusive in favour of the rateability.

It must be also admitted that the occupation by the grocer creates a liability to rate.

The occupation of the buildings by the officers without the prison, inasmuch as it is confined to such occupation as is essential to the proper performance of their duties, cannot in principle be distinguished from the occupation within the prison. The establishment requires the officers; and they are placed, without any intention on their own part, on premises belonging to the establishment. What difference can it make whether such premises are within or without the walls of the building principally appropriated to the purpose of confinement? [Lord Campbell C. J. Your principle would go to the extent of exempting them if these premises were in one parish and the prison in another.] That is not an absurd result. [Lord Campbell C. J. I cannot see that it makes any difference whether the officers pay rent or have so much less salary.] It certainly would make no difference as to premises occupied within the walls: and there can, in this respect, be no distinction as to premises within or without. [Coleridge J. Suppose the directors to say to the chaplain, We require you to reside in such a street: would not he be the occupier of the house which he took, whether it was let to him by the directors or by any other person?] As much so as if the apartments were within the prison; not more. In either case he would have an occupation sufficient to support an action of trespass. All buildings

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(a) 3 East, 506.

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required as accessory to the prison seem to come within the same principle.

The authorities appear to shew that the occupier of the canteen is rateable.

As to the land on which the convicts are employed, it is devoted, not to producing profit, but to carrying out the public purposes of the establishment. [*Wightman J.* How do you distinguish the case from *Governors of the Bristol Poor v. Wait (a)*?] In that case the Governors occupied, for the purposes of their parish, land out of the parish: here the parish is the same; and, further, even if that were not so, the purpose is public, without restriction to parish or county. [Lord Campbell C. J. If they carried on a farm profitably, by means of convicts, in another parish, devoting the profits to the establishment, could the other parish be deprived of the rateable ground?] That is no more than what takes place in many changes of the mode of occupying. [Coleridge J. As in the case of building a county gaol (b).] There was in fact a profit from the work of the prisoners in *Regina v. Shepherd (c)*. But it must be admitted that the authorities of *Governors of the Bristol Poor v. Wait (d)* and *Regina v. Wallingford Union (e)* are strongly in favour of the respondents, on this point.

Pashley, in reply, was desired by the Court to confine his argument to the cases of the residences of the officers of the establishment. *Rex v. Hurdiss (g)*, the case of the

(a) 5 A. & E. 1.

(b) See Lord Mansfield's remarks in *Rex v. St. Luke's Hospital*, 2 Burr. 1063, 4.

(c) 1 Q. B. 170.

(e) 10 A. & E. 250.

(d) 5 A. & E. 1.

(g) 3 T. B. 407.

gunner, who occupied a battery house, the property of the Crown, goes further than is required for the respondents on this point. And in *Rex v. Terrott* (a) the Court said: "The principle to be collected from all the cases on the subject is, that if the party rated have the use of the building or other subject of the rate as a mere servant of the Crown, or of any public body, or in any other respect for the mere exercise of public duty therein, and have no beneficial occupation of or emolument resulting from it in any personal and private respect, then he is not rateable." But it cannot be said that the officers, for whom a residence is found, derive no benefit from its use. In the case of the Masters in Chancery, *Holford v. Copeland* (b), the apartments were used merely for business. [Lord Campbell C. J. The Masters could no more be rateable for that user than we are for sitting in this Court.] But, if in either case a residence were annexed to the office, that would create a rateability. The burthen of the argument may be fairly said to be shifted when the question is transferred to houses outside of the prison: *primâ facie*, all the body of the prison is not rateable; *primâ facie* all ordinary land is rateable. If any one be rateable, the case is so framed that it is unnecessary to fix upon the party.

Lord CAMPBELL C. J. We are called on to give our opinion whether the whole or any part of these premises is the subject of rate. As to the prison, I entertain no doubt of its being exempt. Prisons have always been considered not rateable: the prisoners there confined are not beneficial occupiers; nor can the gaoler or other

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(a) 3 *Eust*, 513.(b) 3 *B. & P.* 129.

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be said to have a distinct occupation. Next: as to the
GAMBIER occupation which the governor enjoys in excess of what
v. Overseers of is necessary for the performance of his duties. That
LYDFORD. excess being expressly found, he is to that extent not
within the principle which exempts from rate an occupation necessary for the performance of a public duty. Next, the Attorney General gives up the defence of the grocer's residence and the canteen. Then I come to the question of the official residences without the walls of the prison. I think the officers, in those instances, occupy beneficially, and are rateable. It cannot be disputed, I think, that they would be rateable if they paid rent for these houses, and received an allowance for the purpose of doing so. But I cannot see that it makes any difference whether they have a pecuniary allowance or a residence allotted to them: there is a benefit in each case; only the salary will be less in one case than the other, because the benefit is in a different form. It does, I allow, appear to be a subtle distinction, when we discriminate between the residences within the walls of the prison and those without: but, whenever we find ourselves on the confines of conflicting principles, the distinctions must inevitably be subtle. The officers are in the prison merely for the purposes of the prison: but, if we allowed the exemption without the prison, we should have to allow it in cases where the residence was in a different parish. I am therefore of opinion that there is a liability to rate in respect of these residences. No distinction can be made as to the cottages, whether they pay rent or not. The official houses in the barracks will also be within the liability. Lastly, the occupation of the land which is inhabited by the convicts brings with it a

liability to rate. The case cannot possibly be distinguished from *Governors of Bristol Poor v. Wait* (a); there can be no difference whether the dispute is between two parishes or between a parish and a county.

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COLERIDGE J. I agree with my Lord on all the points except one, to which I shall confine myself. As at present advised, I cannot concur in thinking the occupier of any official residence, which is not more than is requisite for the purposes of the office, rateable for such occupation: and I do not think it safe to say that the rule is different according as the residences are within or without the prison walls. Why is it that officers are not rateable for what they occupy within the walls? The directors occupy all within the walls by the prisoners and the officers: and this, not being a beneficial occupation, has in many cases been held not to be rateable. Then the fact here is that residences beyond the walls are allotted to officers which are absolutely necessary for the performance of their duties. They have no choice as to where they reside; they pay no rent. On the last circumstance, however, I do not rely much; for that would merely affect the amount of salary. The residences need not be within the walls; but they must be near: on what principle can we distinguish them from residences actually within the walls? If the governor's house were without the walls, I think it could no more be rateable than it is now: it would not the less be a part of the prison. It is found not to be more than is necessary for the performance of his duty in the prison; and that, on a fair view of the rule, includes reasonable accommodation for his family.

(a) 5 A. & E. 1.

1854. **WIGHTMAN J.** The question is, What part of these premises is rateable, or rather what is exempt from rate. It is hardly contended that the prison itself is rateable, or that the governor is not rateable for the excess, which is found as a fact. As to the official residences without the walls, I think we may draw the line there; we certainly must draw it somewhere; either rent is paid, or there is an equivalent in the way of salary. The separate residences seem to me to fall within the ordinary rule as to beneficial occupation. On the other points, also, I agree with my Lord. The case of the convict farm is clearly not distinguishable from *Governors of Bristol Poor v. Wait (a)*.

GAMBER
v.
Overseers of
LYDFORD.

(No fourth Judge was present.)

LORD CAMPBELL C. J. There is no victor: and there will be no costs.

The following order was drawn up: "It is considered and adjudged by this Court: That the appellant is rateable in respect of all the lands and buildings assessed except the prison and the governor's house within the prison; and that the appellant is also rateable in respect of the excess of accommodation in the coach-house and stable within the prison: It is thereupon ordered that the rate do stand, except as aforesaid, and that the same be amended, and judgment entered accordingly by the Sessions."

(a) 5 A. & E. 1.

1854.

The QUEEN against EVANS.

Wednesday,
January 25th.

H. J. HODGSON, in last *Hilary* Term, obtained a rule calling on the prosecutors to shew cause why an order, made by persons named in the rule, being five justices of *Caernarvonshire*, on 28th *March* 1853, "upon the complaint of *David Davies*, whereby they did order *Rowland Evans*, as president and officer of *The Bangor Rechabites Benefit Society*, to reinstate the said *David Davies* as a member of the said society, and, in default of his so doing, to pay the said *David Davies* the sum of 50*L.*, should not be quashed."

From the affidavits in support of the rule it appeared that *The Bangor Rechabites Enrolled General Benefit Society* was, in 1841, established and enrolled according to the provisions of stats. 10 *G.* 4. c. 56. and 4 & 5 *W.* 4.

The rules of a benefit society, established, enrolled and certified under stats. 10 *G.* 4. c. 56., 4 & 5 *W.* 4. c. 40. and 9 & 10 *Vict.* c. 27., provided that, if any misunderstanding should happen between the Society and any of its members, the matter should be submitted to the decision of arbitrators according to stat. 10 *G.* 4. c. 56., nine of whom should be elected in

the first quarterly meeting after the passing of the said laws; and that, when any dispute should arise, the names of the arbitrators should be shuffled in a box or glass, and the first five names taken up by the complaining party should be the arbitrators for the question at issue, and their decision should be final. The Society, at their first quarterly meeting, appointed a general committee for the purpose of electing arbitrators; and nine arbitrators were shortly afterwards elected. Afterwards, in consequence of some of them having left the neighbourhood, and of others having refused to act if called on, the general committee elected nine new arbitrators in the place of the first set. After the first election, but before the second, *D.*, a member of the Society, was expelled for an infringement of one of the rules, as directed by the rule itself. He applied, after the second election of arbitrators, to have the question of his expulsion referred to arbitration. The Society appointed a day for that purpose; and *D.* and six of the arbitrators last elected attended. *D.* refused to draw five names out of the nine, according to the rule; and he eventually, with the consent of the Society, signed an agreement, submitting the dispute to five out of the six arbitrators then present (he having been previously allowed, on his own request, to reject any one of the six he chose); their decision to be final. The five arbitrators made their award, adjudging him to be properly expelled. *D.* applied for a rehearing, which was granted; but, upon the meeting for a rehearing, *D.* refused to select his arbitrators according to the rule; and he subsequently made a complaint before justices, under stat. 4 & 5 *W.* 4. c. 40. ss. 7., 8.; and the justices made an order requiring the Society to reinstate him, or to pay him 50*L.*

Held, that the justices had no jurisdiction to make such order, there having been no neglect or refusal by the arbitrators to make an award, and it not being open to *D.* to contend that the application for settlement by arbitration had not been complied with in forty days, he being estopped, by the written agreement, from disputing the validity of the appointment of the arbitrators.

1854. c. 40. The rules of the Society were duly certified as directed by those Acts; and were afterwards altered in 1849, and the rules, so amended, duly certified according to the provisions of stat. 9 & 10 *Vict. c. 27*. The 2d rule required every person becoming a member of the Society to sign a pledge to abstain from every intoxicating beverage: and, by the same rule, it was declared that, if any member should break the said pledge, he should be no longer a member, unless the Society should choose to readmit him as a new member upon his paying a fine as specified in the said rules. The 40th rule provided that, should any misunderstanding happen between the Society and any of its members at any time thereafter, the matter should be submitted to the decision of arbitrators according to stat. 10 *G. 4. c. 56.*, nine of whom should be nominated and elected in the first quarterly meeting after the passing of the said laws, no one of them having any claim to any benefit from the Society; and that, when any dispute should arise, the names of the arbitrators should be written on a slip of paper and shuffled in a box or glass; and the first five names taken up by the complaining party should be the arbitrators for the question at issue; and that their decision should be final.

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In *July*, 1849, a general committee of the Society, previously appointed for the purpose at their first quarterly meeting, elected nine persons as arbitrators under the 40th rule. Some of these arbitrators having refused to act if called upon, and others having left the neighbourhood of *Bangor*, nine other persons, none of whom had any claim to any benefit from the Society, were, in *June* 1852, at a general meeting of the Society, elected as arbitrators in the place of the nine arbitrators first elected. It was deposed that this was done for the

mere purpose of having a full number of arbitrators; and that, at the time of the election, there was no dispute between the Society and any member. In *April*, 1852, *Davies* had been expelled from the Society for having infringed the 2d rule by breaking his pledge; and in *September*, 1852, he served a notice upon *Evans*, then president of the Society, requiring the Society to submit the question of his expulsion to arbitration. A meeting was appointed for that purpose by the president and the committee, and notice given to *Davies*. On the day appointed, six out of the nine last elected arbitrators attended, the other three being in readiness to attend in case their names should be drawn. *Davies* also attended. The names of these nine arbitrators were written by the president upon slips of paper, and shuffled in a box, as directed by the 40th rule. *Davies* was then requested to take five names out of the box; but he refused, and proposed, instead, to submit the dispute to five out of the six arbitrators then present, he being allowed to reject which one of the six he should choose. The president and the committee assented to this; and *Davies* selected five of the arbitrators. The following agreement was then signed, at the meeting, by the president and *Davies*.

“Memorandum of agreement made and entered this 6th day of *October* 1852, between *David Davies* of *Lonypobty*,” &c., “of the one part, and *Rowland Evans*, of” &c., “on behalf of *The Bangor Rechabites Enrolled General Benefit Society*, of the other part: Whereas certain dispute has arisen between the said *David Davies* and the said Society as to the expulsion of the said *David Davies* from the said Society, it is witnessed that the said *David Davies* and *Rowland Evans* do hereby agree to refer such dispute to the arbitration

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and decision of the following gentlemen" (here followed the names of the five arbitrators chosen by *Davies*), "whose decision shall be final and conclusive between the said parties hereto. As witness" &c.

Davies's statement, in his affidavit in answer, as to his signing this agreement, was as follows. "That this deponent thought he was bound to submit the case to them, and accordingly did so. That, before the case was gone into, he, deponent, was told by Mr. *Henry Lloyd Jones*, one of said persons so acting as arbitrators as aforesaid, that he must sign a paper agreeing to abide by the decision which should be come to, and that the case could not be entered into until he did so: that, said *H. L. J.* being an attorney, he, deponent, supposed that it was required by law that such a document should be signed, and he therefore signed" the paper: "that said *Henry Lloyd Jones* did not, either directly or indirectly, state to deponent or in his this deponent's hearing, that his object in getting the said agreement signed was to prevent any dispute arising as to the sufficiency of the appointment of the persons about to act as arbitrators; nor did he, this deponent, propose or consent to refer the dispute in question to any of the arbitrators who were then present; nor did he select or agree to any of them for that purpose, except by signing the said paper."

The affidavits in support of the rule further shewed that, immediately upon the signing of the agreement, these five arbitrators proceeded with the reference, and, on the same day as that on which the meeting was called, published their award, in the following terms. "We, the major part of the arbitrators duly appointed by *The Bangor Rechabite Enrolled General Benefit Society*, established at *Bangor*, in the county of *Carnarvon*, do hereby

award and order that we expel *David Davies*, of *Lony-pobty*, from the said Society. Dated" &c. A copy of the award was served on *Davies*; who, on 18th *January* 1853, served on the president the following notice.

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"Mr. *Rowland Evans*, president of *The Bangor Rechabite Benefit Society*; I give you this notice, to bring my case of being expelled from the Society before the arbitrators with fair play, that I may get satisfaction; or I will bring my case to the magistrates. *Bangor*, 18th *January* 1853."

The president and the committee sent a notice to *Davies*, that they were willing to consent to another reference, and that the said arbitrators would meet on 25th *February* 1853, for the purpose of rehearing the case; and they requested *Davies* to attend. The meeting took place on that day; and the last elected arbitrators and *Davies* attended. The president wrote the names of the nine arbitrators on slips of paper, preparatory to placing them in the box to be shuffled; but *Davies* then stated that he would not proceed with the reference, and left the room. No other application for a rehearing was afterwards made by him.

On the 15th *March* 1853, *Davies* made a complaint before the magistrates at the *Bangor* Petty Sessions, against *Evans*, as president of the Society, stating the fact of his, *Davies's*, expulsion, and of his first application for a reference to arbitration, and further stating that such application had not been complied with within forty days next after such application. Before the magistrates, the facts above stated were proved; and it was contended, on behalf of the Society, that the magistrates had no jurisdiction in the matter, *Davies* having applied to the Society for a reference to arbitration, and an award having been accordingly made,

1854. within forty days from such application ; which, by the
 The QUEEN terms of the submission, was to be final. On behalf of
 v. *Davies* it was contended that no binding award had
 EVANS. been made, inasmuch as the arbitrators who had made
 it were not arbitrators appointed according to the rules
 of the Society. The magistrates “decided upon enter-
 ing into the merits of the said dispute, without assigning
 any reasons for arriving at that conclusion :” and they
 accordingly made the order in respect of which the rule
 above mentioned was obtained.

Bramwell and *Willes* now shewed cause against the rule. The justices had jurisdiction to make the order in question. Stat. 4 & 5 W. 4. c. 40. s. 7. gives them jurisdiction either when the application for a settlement by arbitration has not been complied with within forty days after such application, or where there has been an absolute neglect or refusal on the part of the arbitrators to make an award. The justices are not bound, in making their decision, to state the grounds upon which they make it. But in the present instance, no doubt, they were of opinion that the second appointment of arbitrators was not made *bonâ fide*. Any proceeding of the arbitrators, under an invalid or fraudulent appointment, would be void, and tantamount to a refusal and neglect on their part to make a valid award. And a reference to such arbitrators is no compliance, legally speaking, with the application for a settlement by arbitration. It is clear that here the second appointment was merely a colourable one ; it was made *post litem motam*, and was obviously for the purpose of obtaining a set of arbitrators favourable to the society. But, even assuming that it was made *bonâ fide*, it was not made in accordance with the provisions of the rules of the Society and stat. 10 G. 4. c. 56. s. 27. ; and

the award was therefore not valid. [*Coleridge J.* Suppose the Society, under a misapprehension, removed one body of arbitrators, and substituted another. Would any decision by these new arbitrators be invalid?] It is not necessary to go so far: in the present case the first arbitrators were not regularly removed; and it is clear, at all events, that, while they remain unremoved, no fresh arbitrators can be appointed, and that, if they are appointed, their decisions are not valid. [*Lord Campbell C. J.* The appointment of the second set of arbitrators would amount to a removal of the first. *Wightman J.* Suppose some of the first set left the neighbourhood: could the Society, without removing them by a formal act, supply their places by others?] The leaving would be tantamount to a refusal to act; and there would therefore be no necessity for a formal act of removal. It will be contended by the other side that *Davies* was bound by the written submission. But that submission is invalid for want of mutuality: this objection, in fact, applies to the whole of the transaction. [*Coleridge J.* In order to give the justices jurisdiction, it must be shewn either that no award at all was made, or that an award was made which was invalid. How can either state of things exist here, where an award has been made to which *Davies* agrees beforehand to submit, as binding?] He signed the agreement under a misapprehension; he did not know what he was assenting to. [*Coleridge J.* The affidavits tend to shew that he signed the agreement with a full knowledge of its purport.] His own affidavit states that he did not. [*Wightman J.* His denial is not very explicit. *Coleridge J.* Suppose the award had been against the Society: could they have applied for a magistrate's order, on the ground that

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1854. no valid award had been made?] It would appear that
 The QUEEN they could. [Lord Campbell C. J. What is the latest
 v. EVANS. case on this point? *H. J. Hodgson*, *contra*, mentioned
Regina v. Grant (a).]

Cowling and *H. J. Hodgson*, *contra*, were not called on.

LORD CAMPBELL C. J. This rule must be made absolute. If the justices had thought that the second appointment of arbitrators was fraudulent, no doubt they would have had jurisdiction to make the order. But there is no evidence to shew that they did, or that they had any grounds for so thinking. *Davies* himself was estopped, by the submission which he signed, from contesting the authority of the arbitrators. It would be most pernicious if, as has been contended, arbitrators appointed by the Society, and acting *bonâ fide* under the belief that their predecessors were incapable of acting, were not to be considered as proper arbitrators, and their award were to be held invalid, because such belief arose from a misapprehension.

COLERIDGE J. I am of the same opinion. The question turns upon the construction of stat. 4 & 5 *W.* 4. c. 40. s. 7. The justices had no jurisdiction unless there had been either no compliance with the application for settlement by arbitration, or a neglect or refusal on the part of the arbitrators to make an award. In the present case, when the matter came before the justices, it was proved to them that an award had actually been

(a) 14 Q. B. 43.

made; and there was nothing on the face of it to shew that it was invalid. It lay, therefore, upon the parties disputing the award to shew its invalidity, before any jurisdiction could accrue to the justices. As to the submission, the stipulation made by *Davies* for his striking out one of the names shews that he was fully aware of the nature and purport of the submission which he signed. I cannot see how the magistrates could come to any other conclusion than that *Davies* was estopped by the submission, unless the transaction was tainted with fraud; and of that neither the affidavits nor the statements before the magistrates furnish any evidence. It would be most mischievous if decisions of this kind, which must necessarily be, now and then, a little irregular, but which are intended to be final, should be disturbed upon such grounds as have been urged in the present case. There has been a substantial compliance with the Act.

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WIGHTMAN J. The facts of the case, as they appear upon the affidavits, did not warrant *Davies* in contesting the jurisdiction of the arbitrators; and the attempt to shew jurisdiction in the magistrates has failed.

(No fourth Judge was present.)

Rule absolute (a).

(a) Reported by *Francis Ellis, Esq.*

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Friday,
January 27th.

The QUEEN *against* DEVERELL and another.

The rate-payers of a district of a parish adopted so much of the provisions of stat. 3 & 4 W. 4. c. 90. as relate to lighting, ordered a certain sum to be raised for the succeeding year, and elected inspectors; and a treasurer was appointed. The inspectors, in the course of the year, called upon the overseers of the parish to collect and levy, and pay to the treasurer, a part of this sum.

The overseers

not having obeyed, a summons was taken out, reciting an information that they had neglected to pay to the treasurer the amount of the order made on them by the inspectors in pursuance of the statute, and requiring them to appear to answer the information, and be dealt with according to law. They appeared, and made their defence against the complaint, which was supported on behalf of the inspectors; when the justices refused to issue a warrant of distress on the overseers in pursuance of sect. 38, though they were requested, on the part of the inspectors so to do.

A rule was obtained, under stat. 11 & 12 Vict. c. 44. s. 5., calling on the justices and overseers to shew cause why the justices should not issue such warrant. The affidavit on which the rule was granted shewed the above facts, but did not shew whether any or what evidence was given before the justices at the hearing, or what the defence was.

The overseers having made no affidavit in answer, but opposing the rule on the ground that it did not appear that any facts had been laid before the justices making it incumbent on them to issue their warrant, this Court made the rule absolute, with costs to be paid by the overseers.

CROWDER, in last Term, obtained a rule calling on *John Deverell* and *Robert Miller Mundy*, Esquires, two justices of *Hampshire*, and *Edward H. Haggett*, *James Court White* and *George Small*, overseers of the poor of the parish of *Warblington*, in the said county, to shew cause why the two justices should not issue a warrant of distress in pursuance of stat. 3 & 4 W. 4. c. 90. s. 38., for levying, by distress and sale of the goods of all or any of the said overseers, the sum of 150*l.*, being the amount directed to be paid by the said overseers by an order, dated 6th *July* 1853, issued under the hands of five of the inspectors duly elected for carrying the provisions of the said Act into effect in the District of *St. James, Emsworth*, being a part of the parish of *Warblington*; or why a mandamus should not issue directed to the said two justices, commanding them to issue a warrant of distress for the purpose aforesaid.

From the affidavits on which the rule was obtained it appeared that, on 4th *June* 1841, an order in council issued, under stat. 59 *G.* 3. *c.* 134. *s.* 16., whereby Her Majesty assigned a district, part of the parish of *Warblington*, to a chapel in that parish, the district to be named *St. James's District, Emsworth*. Proceedings then took place (detailed at length in the affidavits) having the effect, as suggested, of an adoption, for this district, of the provisions of stat. 3 & 4 *W.* 4. *c.* 90., so far as they relate to lighting, by a resolution passed at a meeting held on 8th *November* 1852: and it was resolved, at the same meeting, that there should be twelve inspectors, who were accordingly then elected; and that the money to be raised in the succeeding year for the purposes of the Act should be 250*l.*: and the affidavits set forth a notice of the above facts, and stated the circumstances under which it was given. A treasurer was afterwards appointed. At a meeting of inspectors (by adjournment) on 6th *July*, 1853, five inspectors were present; when it was unanimously resolved that the overseers of the parish of *Warblington* should be required to pay to the treasurer 150*l.*, part of the amount which the inspectors were authorized to call for in the year. An order was then signed by the five inspectors, requiring the overseers to collect and levy the sum, and pay it to the treasurer within three calendar months: which order was delivered to *J. C. White*, one of the overseers; and a certificate of the election of the inspectors was served on the overseers. Further formalities (not material to the present report) were set out in the affidavits. The overseers did not pay the sum within the time named in the order: and the inspectors directed the treasurer to enforce payment: and the treasurer

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1854. “did, on the 21st day of *October* last, make complaint
The QUEEN to *Robert Miller Mundy*, Esquire,” justice of *Hampshire*,
V.
DEVERELL. “who thereupon issued a summons, under his hand and
seal, of which a copy” was annexed to the affidavit.
The summons recited that information had been laid
before the justice, for that the overseers had neglected
to pay “the treasurer duly appointed for the district of
St. James Emsworth, in the said parish, of *Warblington*,
by the inspectors of the said district, pursuant” to stat.
3 & 4 *W. 4. c. 90.*, “the sum of 150*l.*, the amount of
a certain order made on you by the said inspectors in
pursuance and for the purpose of carrying the provisions
of the said statute into effect in the said district, three
calendar months having elapsed since the delivery of the
inspectors’ order to collect and levy the said sum of
150*l.*” The summons then commanded the overseers
to appear on 25th *October*, “before such justices of the
peace for the said county as may then be there, to
answer to the said information, and to be further dealt
with according to law.” The three overseers “were
duly served with the said summons, and duly appeared,
pursuant thereto, before” Mr. *Deverell* and Mr. *Mundy*,
“and made their defence to the said complaint and
summons, by *Edwin Albery*, of” &c., “gentleman, as
their attorney; and the said complaint and summons
were supported, on behalf of the” “treasurer of the
said inspectors, by this deponent as his attorney.” The
further hearing was adjourned to 8th *November*, “and
was then resumed, and concluded before the said two
justices;” and “the said justices, at such conclusion of
the said hearing, refused to issue their warrant for
levying the said 150*l.*, which the said overseers of the
parish of *Warblington* were directed to levy, collect and

pay by the said order, and which remained wholly unpaid as aforesaid; although this deponent, as the attorney or agent for the said inspectors and for "their said treasurer, requested and demanded of them so to do. And this deponent further saith that the said justices have not granted their said warrant thence hitherto."

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It was further deposed that, by reason of the non-payment, the inspectors had been prevented from carrying out the purposes of the Act.

No affidavit in opposition to the rule was put in.

Atherton and *Cowling* now shewed cause. Assuming that all the steps essential to the adoption of the provisions of stat. 3 & 4 *W.* 4. c. 90. had been taken, in conformity with sect. 5 and the following sections, and sect. 73 (a), still the Court cannot act on stat. 11 & 12 *Vict.* c. 44. s. 5. without further information than the affidavits supply as to what passed before the magistrates. All that appears is that the overseers were summoned for not paying, and a warrant of distress asked for; and that the summons was opposed: it may be that the inspectors failed to satisfy the magistrates that the Act had been duly adopted, or the resolutions duly passed, or the request duly made on the overseers. The provision of sect. 5 of stat. 11 & 12 *Vict.* c. 44. was substituted for mandamus: and, in conformity with the rule which prevailed as to mandamus, it must clearly appear

(a) The counsel opposing the rule contended that the affidavits in support of the rule failed to shew that the Act had been regularly adopted, according to its provisions and those of stat. 7 *W.* 4. & 1 *Vict.* c. 45. The Court, however, were of opinion that the adoption was shewn by the facts deposed to; and the counsel did not finally persist in the objection. See *Regina v. Overseers of Kingswinford*, Easter Term, May 8th, post.

the overseers: they do not tell us what passed. If any substantial question had been raised before the justices, no doubt the overseers would have told us of it. This seems to me exactly the case for which the statute meant to provide, and in which we ought to interfere. The statute protects the justices only, not the parties, if the warrant cannot be supported.

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ERLE J. (a). The overseers have satisfied me that no valid objection was raised before the justices. All they do is to instruct two learned counsel to oppose this rule.

Rule absolute for the issuing the warrant
by the justices: costs to be paid by
the overseers.

(a) *Wightman J.* had left the Court.

The QUEEN *against* POWELL and others.

Friday,
January 27th.

CLEASBY, in last Term, obtained (in the Bail Court, before *Crompton J.*) a rule calling on *Charles Powell, John Horsley Palmer, Thomas Lane* and *Thomas Barker*, Esquires, to shew cause why one or more information or informations in the nature of a quo warranto should not be exhibited against them, to shew by what authority they claim to exercise the office

By the governing charter of a corporation, the Community were annually to elect four wardens from the men of the Community.

In fact, for about four hundred years, the election had been made

by a court of assistants, who were elected, by the court itself, from the body of the Community. The wardens had always been elected from members of the Community, and generally, but not uniformly, from those who were members of the court of assistants.

Held: 1. That a by-law establishing such a mode of election would be good.

2. That the passing of such a by-law in fact might be presumed from the usage.

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London: upon the grounds:

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1st. That they were illegally chosen or appointed to the said office;

2d. That they were not chosen or appointed by the whole body of the commonalty of the said Company:

3d. That they were chosen or appointed by a limited portion of the Company calling themselves the Court of Assistants.

The rule was obtained on the affidavit of the proposed relator, *Henry Newnham*, a freeman and liveryman of the Company. He deposed that he had discovered and believed that the Company of Mercers was incorporated by a certain ancient Royal Charter, granted by *Richard 2.*, in the 17th year of his reign, and still in force; by which the King granted that the Men of the Mystery of the Mercery of the City of *London* might have a perpetual community of themselves; and that such community might severally elect and make, from and amongst themselves, four wardens from the Men of the said Community and Mystery, to exercise, regulate and govern the Community and Mystery aforesaid, and all the men, state and affairs of the same for ever. That the said charter was confirmed by charter and letters patent of 3 *H. 6.*: and furthermore, by his letters patent, the said King *Henry 6.* granted that the Wardens and Commonalty of the said Mystery, and their successors, should have a common seal for the sealing and use of the business of the Commonalty; and that they might be persons able in law to plead and be impleaded. That the said charter and letters were exemplified and confirmed in 4th and 6th *Ph. & M.*, and in 2 *Eliz.*: and, finally, *James* the 1st, in the 10th year of his reign,

confirmed the whole of the preceding charters, but without any alteration or extension.

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That, so far as deponent could discover, and verily believed, no charter altering the constitution of the Company was granted to the Company or Mystery, until the charter of 6 C. 2. hereinafter mentioned: and that the enumeration and statement of the charters of the Company agrees in every respect with the statement relating thereto of the commissioners appointed by W. 4 to inquire and report upon the municipal corporations in *England* and *Wales* (a): and that no alteration in the constitution of the Company, as deponent could discover and as he believed, was lawfully made by charter or otherwise until the charter of 6 C. 2.

That *Charles 2.*, by charter of 6 C. 2., the former charters having been surrendered to the Crown after the judgment in quo warranto against the City of *London*, granted to the Company a new charter with a different constitution (some particulars of which were stated); and that, by stat. 2 W. & M. c. 8. (b), it was enacted that all the companies of the said City should be restored to their former constitutions, as they lawfully stood at the time of the said judgment given; and that as well all surrenders, as charters made or granted by *Charles 2.* or *James 2.* since the giving of the said judgment, should be null and void to all intents and purposes (c).

That deponent believed and submitted that, from the time of the passing of the said Act, the constitution of the said Mystery or Company, as regulated by the said charters of *R. 2.* and *H. 6.*, became and was the lawful constitution thereof, such Mystery or Company being

(a) See *Second Report of the Commissioners, 1837, London Companies*, 1.

(b) Sess. 1.

(c) Sect. 14.

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one of the Companies of the said City mentioned and referred to in the said Act: and that the freemen and liverymen or commonalty thereof could not, from that time, be lawfully excluded by any court of assistants from the choice and election of the wardens who were to have the government thereof: and that the affairs and concerns of the said Company ought to have been thenceforth, and now to be, managed by four wardens to be elected by the general body of the commonalty of freemen, or, as they are sometimes called, the generality of the Company: and that each of the said commonalty is entitled to exercise his elective franchise for the appointment or election of such four wardens.

That certain persons, being members of the said commonalty of the said Company, have, as hereinafter more particularly shewn, usurped to themselves the management of the affairs and concerns of the Company, to the exclusion of the others of the commonalty; and, in particular, have excluded the greater number of the commonalty from their right of interfering or voting in the election of the wardens of the Company.

That deponent had discovered and believed that for many years the affairs and concerns of the said Company have not been governed by wardens duly chosen in accordance with the said charters of R. 2. and H. 6., or either of them, or according to the legal constitution of the Company: but that the said affairs and concerns have, for many years, been governed by certain persons assuming to constitute a court of assistants, consisting of from twenty eight to thirty six persons, or thereabouts; one of whom is called and assumes to be the prime warden or master of the Company; three others of whom are called and assume to be wardens of the Com-

pany; and the others of whom are called and assume to be members of the court of assistants. That, for many years, the persons so constituting or assuming to be such court of assistants, who all assume to hold their offices as members of the court of assistants for their respective lives, have assumed to themselves, and exercised, the exclusive right to choose or appoint annually from among themselves the prime warden or master and wardens of the Company: and such court of assistants, from time to time, when and as vacancies (or what they are pleased to call vacancies) occur in such court of assistants, fill up such vacancy by electing or calling up at their sole pleasure or discretion such other members of the commonalty of the Company as they deem proper to be members of the said court of assistants; and the persons being so elected or called up thereupon become (or assume to become) members of such court of assistants for life. That there are, as deponent believed, between 100 and 200 persons who constitute the commonalty of the Company, who have duly acquired their rights, as such, either by birth or servitude; all of whom are entitled to exercise their elective functions in the choice of the wardens for the time being of the Company equally with those who are members of the pretended court of assistants: and that such of the members of the commonalty as are not members of the court of assistants are and have been unduly excluded from exercising their elective privileges as members of the Company.

That the election of prime and other wardens usually took place in *September* in every year; and that deponent, in *June* 1852, gave notice to the attorneys of the Company, requiring that the master and wardens should be elected by the commonalty according to the

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constitution of the Company. That, notwithstanding this was well known to the court of assistants, that court had, in *September* 1852, chosen the persons named in the rule as prime warden or master and wardens; and such persons had assumed to act as master and wardens, and, together with the persons who assumed to constitute the court of assistants, to manage the affairs of the Company. That the persons assuming to act as master, wardens and members of the court of assistants acted as trustees of large estates real and personal, enjoying considerable patronage and deriving pecuniary advantages. That the members of the court of assistants allowed certain officers to be elected by the commonalty.

In answer, an affidavit was made by the clerk and solicitor of the Company jointly. They deposed that the earliest charter of which the Company possessed any authentic record was the charter of *R. 2.*, mentioned in *Newnham's* affidavit; and that the words of the charter, in respect to the part of the grant mentioned in that affidavit, were: "quòd ipsi de cætero unam communitatem perpetuam de seipsis habeant, et quòd eadem communitas singulis annis eligere possint et facere quatuor custodes de hominibus dictarum communitatis et mysteræ, ad supervidendam, regendam et gubernandam mysteram et communitatem prædictas, ac omnes homines, personas et negotia earundem in perpetuum." That several other charters were granted to the Company as stated by *Newnham* in his affidavit. The affidavit then referred to stat. 1 *Ed. 4. c. 1.* (A.D. 1461.), by which it was enacted (sect. 3) that all liberties, privileges, franchises, &c., corporations, &c., and all manner of grants, &c., which were granted in the times of *Henry 4.*, *Henry 5.* and *Henry 6.*, to (amongst

others) the Wardens of the commonalty of the Mystery of Mercers of the City of *London* should be in like force and virtue as if they had been granted by any King or Kings lawfully reigning, as if they had been granted in the times of *Edward 3.* and *Richard 2.*, late lawful Kings of *England*. That deponents verily believed that many of the books and documents of the Company were destroyed by the great fire in *London* in 1666; but that the Company have still several ancient books and documents of the Company belonging to them; and from such ancient books it appears, and deponents verily believed, that, prior to the said charter of *R. 2.*, and as far back as 1347, and from thence continually down to the time of the aforesaid charter of *R. 2.*, the Company of Mercers of the City of *London* was governed by wardens, four in number, annually elected; and that each of those four wardens, on leaving office, at the end of the year, nominated his successor. (Entries were set out.) That deponents believed that the Company of Mercers was and has been a guild or corporation by prescription from time immemorial. That it appears from the ancient books of the Company, and deponents verily believed, that, after the charter of *R. 2.* was granted in 1394, as aforesaid, the custom and practice of the outgoing wardens to appoint their successors continued unchanged and without interruption, as it had previously existed as before mentioned, until 1463; and that the entire business of the Company was managed by such wardens. That it further appears from the books of the Company, and deponents verily believed, that, from 1463, there has existed a body of the liverymen of the Company called and known as The Court of Assistants of the

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Company; and that the number of such court of assistants, between the years 1527 and 1684, when Charles 2. granted the Company their new charter, always exceeded twelve, and varied from nineteen to twenty four persons, besides the four wardens; and, from that period to the present time, such court of assistants has varied from twenty one to thirty two persons, being liverymen of the Company.

The surrender of the Company to the Crown, dated 3d October 1684, antecedent to the grant of the charter of C. 2. before mentioned, was set out.

That deponents verily believed that such court of assistants was originally established on account of the trouble and inconvenience, in early times, of summoning and assembling the whole body of the commonalty of the Company. That, not only have the court of assistants elected the wardens of the Company for many years in modern times, as stated in *Newham's* affidavit, but that, during the whole time that such court of assistants has existed as aforesaid, the wardens of the Company have invariably from time to time, been elected and chosen, and still are elected and chosen, at such court of assistants of the Company; as appears by the records and documents of said Company. That, as far as deponents could ascertain from the books of the Company, the practice has been, ever since the existence of the court of assistants and from the year 1468 to the present time, and still is, for the warden and court of assistants to elect persons from the livery of the Company to fill up vacancies in such court of assistants as deaths occur. And that the members of the court of assistants are invariably liverymen of the Company, and members of the commonalty

at large of the Company; and that they continue liverymen of the Company, and members of the body of the commonalty at large, after their election to be members of the court of assistants, and retain all the rights and privileges of liverymen of the Company. That, although deponents had carefully searched and examined the records and documents of the Company from the earliest times of which the Company possess any records or books, they cannot discover that at any time since the first existence of the Company has there been any instance of the election of any warden or wardens by the body of the commonalty at large of the Company. That they believed that the election of the wardens of the Company, from the earliest times, was, and always has been, either by the wardens for the time being of the Company down to 1463, or by the court of assistants of the Company from the year 1463 down to the present time.

That the persons named in the rule were, in *September* 1853, elected wardens by the court of assistants, in accordance with the usual mode of election; and that each was, at the time of his election, a freeman and liveryman of the Company, and a member of the commonalty.

That deponents denied that they had assumed or exercised the exclusive right to choose or appoint annually from amongst themselves the prime warden or master and wardens of the Company; although, of late years, the fact has been that the prime warden or master and wardens have, at the time of their election, been members of the court of assistants. That they had, at the time of their election, invariably been freemen of the Company and members of

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1854. the body of the commonalty at large. That there are instances, in the records of the Company, in which they have not been members of the court of assistants at the time of their election, or previously thereto. But that the practice had been to elect men who were members of the court of assistants, as having more knowledge and experience of the affairs of the Company than others not upon the court. That the prime warden or master and wardens and court of assistants had always, from the time of their first existence, had almost the entire management of the affairs of the Company.

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Sir *A. J. E. Cockburn*, Attorney General, *Bramwell* and *Bovill* now shewed cause. The affidavits in answer shew a good title. A by-law limiting the number of electors, provided no integral part of the corporation were excluded, would be good; *The Case of Corporations (a)*, *Rex v. Ashwell (b)*, *Rex v. Westwood (c)*. [Lord Campbell C. J. Questions of this kind were more frequently before the Courts, some years ago: we then used to think this quite trite law.] Next, the existence of such legal by-law may be presumed from usage; and the law may be pleaded as not extant in writing; *Rex v. Head (d)*, *Rex v. Ashwell (b)*, *Perkin v. Master, Warden, &c. of The Company of Cutlers in Hallamshire in the County of York (e)*. And, further, the words of the charter itself are not express against this mode of election, and may therefore be explained by usage; *Gape v. Hanley (g)*; *Rex*

(a) 4 Rep. 77 b.

(b) 12 East, 22.

(c) 7 Bing. 11, in Dom. Proc., affirming the judgment of K. B. in *Rex v. Westwood*, 4 B. & C. 781.

(d) 4 Burr. 2515.

(e) 21 MS. Serjt. Hill, p. 65 (cited in 2 Selw. N. P. 1162, 10th ed.).

(g) Note (a) to *Blankley v. Winstanley*, 3 T. R. 288.

v. The Mayor and Citizens of Chester (a). The case of *Rex v. Attwood (b)* is exactly in point. The relator might here, by inquiry, have learned that the usage was as stated in the affidavits in answer; and the rule should therefore be discharged with costs; for, if these facts had been before the learned Judge when the rule was applied for, he would have refused the application.

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Cleasby, contra. It is true that a good by-law may be presumed from usage; and the usage here is sufficiently shewn if the by-law be good. But the relator contends that such a by-law as would establish this mode of election would be bad, as constituting a self-electing body and infringing the original constitution of the Company. This question is not decided by *Rex v. Attwood (b)*. It is true that the same objection might have been taken there; but it was not noticed. The objection that the election was from a restricted number was suggested here by the Report of the Municipal Commissioners (c); but that is certainly answered in point of fact, as in *Rex v. Attwood (b)*. [Lord Campbell C. J. That objection would have been fatal. But was not the objection on which you now rely one of the grounds in *Rex v. Attwood (b)*?] It is there mentioned in the second ground; but it was scarcely noticed in argument: probably the affidavits did not raise the point, as it is not distinctly noticed in the judgment. The body of electors cannot be limited, by by-law, to a body not representing every integral part of the corporation. [Lord Campbell C. J. All the members of the court of assistants here must have been members of the com-

(a) 1 M. & S. 101.

(b) 4 B. & Ad. 481.

(c) *Second Report*, 1837, *London Companies*, 1.

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monalty.] That would not make them representatives of the commonalty if they themselves select the members of the commonalty who are to constitute their body. The importance of the representative principle is admitted by *Littledale J.*, in *Rex v. Westwood* (a), though he held the particular by-law then under consideration good; and by *Holroyd J.* in the same case (b), where he explains the decisions in favour of the elections in *Rex v. Ashwell* (c) and *Rex v. Bird* (d), on the ground that the exercise of the power of election was narrowed "to a part of the burgesses themselves," "and to certain other burgesses elected by the body at large." And the general principle, that by-laws cannot be made contrary to the constitution of the corporation, was affirmed in *Rex v. Ginever* (e), where a by-law nearly two hundred years old was held bad on that objection. It is to be observed that in *Rex v. Attwood* (g) the charter of R. 2. confirmed the customs of the guild, a circumstance upon which *Taunton J.* relies: but here the supposed by-law, or usage, is later than the governing charter, and cannot controul its generality.

Lord CAMPBELL C.J. : I think that, if the facts now disclosed had been before my brother *Crompton* when the rule was moved for, he would not have granted the rule. There is no ground whatever for questioning the validity of the election. Here is an usage of nearly four hundred years: if that can have a lawful origin, we ought to presume one. Now such an usage would be justified by a by-law limiting the electors as they are here

(a) 7 Bing. 64; 4 B. & C. 805.

(c) 12 East, 22.

(e) 6 T. R. 732.

(b) 4 B. & C. 829.

(d) 13 East, 367.

(g) 4 B. & Ad. 481.

limited: such a supposed by-law has been held good again and again. The case is exactly like *Rex v. Att-
-orney* (a), where this Court refused to interfere. We should not be acting rightly if we disturbed an election made. As to there being a self-election, these officers are not self-elected. It may be right that the election should be in the general body: but that question is for the Legislature. It is supposed that the corporation of London is to be reformed: the Legislature may then take the point into consideration (b).

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COLERIDGE J. We must discharge this rule, upon the invariable principle that, when we find a very ancient usage, we are to presume any thing which will support it. If we were to listen to ingenious legal objections or astute remarks, or enter into minute inquiries into evidence, the general result would be that, the older an usage was, the less should we be able to support it: and, instead of the antiquity being a protection, an old usage would be more difficult to defend than a modern one. Here we have an admitted uninterrupted usage from 1463. It was at first suggested that it could be traced back only to a later era; but from the affidavits in answer we find that it has prevailed so long. We may fairly infer the existence of a by-law limiting the power of election to this select body: and I do not at all agree that the self-election destroys the representative character.

(a) 1 B. & Ad. 481.

(b) The Report of The Commissioners appointed to inquire into the existing state of the Corporation of the City of London, &c., has been presented to both Houses of Parliament, and printed, A. D. 1854. The Commissioners abstain from noticing the Companies, as not being constituent portions of the Corporation; p. x.

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WIGHTMAN J. *Re* v. *Attwood* (a) is a direct authority in favour of the defendants. But it is objected that the body to whom the power of election is given is itself self-elected. I think that this body stands on the same footing as the officers elected: I cannot see why the right of delegation may not be delegated in one case as well as in the other. There cannot of course be any by-law restricting the persons eligible, nor any extension of the eligibility to persons not originally eligible.

ERLE J. I am of the same opinion: and I have no remarks to add.

Rule discharged, with costs.

(a) 4 B. & Ad. 481.

The QUEEN *against* EYTON, Esquire, and others.

Sect. 95 of
the General
Highway Act,
6 & 6 W. 4.

AT the General Quarter Sessions for *Flintshire*, holden 1st *July* 1852, the Court made an order enacts that, in the case of an indictment for non-repair of a highway preferred at the Assizes or Quarter Sessions by order of justices as there directed, the costs of the prosecution shall be ordered, by the Judge who tries or the justices of such Quarter Sessions, to be paid out of the rate made and levied in pursuance of the Act in the parish in which such highway shall be situate) extends, not only to rates made or levied at the time of the order, but to the highway rate in general; and, if there be not sufficient funds in the hands of the surveyors at that time, they must make a rate for the purpose.

The order binds, not only the surveyors in office at the time, but their successors, until the costs be paid.

Such costs are not, within the meaning of sect. 103, penalties, or forfeitures, inflicted or authorized by the Act to be imposed for any offence against the same, nor balances due from a surveyor, nor costs and charges allowed and ordered by the authority of the Act the manner of levying, recovering and applying of which is not thereby otherwise particularly directed. And therefore they cannot be levied by distress, under the proceedings directed by that section. But a mandamus will issue to compel the taking of the proper steps.

reciting an order of special sessions, which directed a prosecution of The Inhabitants of the township of *Tryddyn* in the parish of *Mold*, in that county, for non-repair of a highway in the township, the surveyors of the township having appeared to an information preferred by *Charles Harrison*, and denied the liability; reciting also that the indictment was preferred by *Harrison* at Quarter Sessions, and the defendants pleaded Guilty; and it was "therefore ordered by us, the justices by and before whom the said bill of indictment was tried, that the costs of such prosecution incurred by the said *Charles Harrison*, amounting to the sum of 72*l.* 8*s.* 3*d.*, be paid to the said *Charles Harrison* by The Inhabitants of the said township of *Tryddyn*, on or before the 31st day of *August*, A.D. 1852, out of the rate made and levied, or to be made and levied, within the said township of *Tryddyn* in pursuance of an Act" &c. (5 & 6 *W.* 4. c. 50.).

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On the 26th *April* 1853, *John Lloyd* and *Roger Bellis* were appointed surveyors of the township. A demand for payment of the 72*l.* 8*s.* 3*d.* was made on them, with which they did not comply. An information was exhibited against them, and was heard before *John Wynne Eyton*, *Edward Pemberton* and *Charles Clough*, Esquires, justices of the county: and, the surveyors assigning no reason for disobedience of the order, the justices were requested to grant a warrant of distress against their goods, under stat. 5 & 6 *W.* 4. c. 50. s. 103.: but the justices declined to do so.

E. Beavan, in *Trinity* term 1853, obtained a rule calling on Messrs. *Eyton*, *Clough* and *Pemberton*, and *Lloyd* and *Bellis*, to shew cause why the said three

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justices should not issue their warrant (as in the rule stated in the judgment in this case); and it appeared none of the justices had been present at the trial.

In last term (a), *R. V. Williams* shewed cause; and *Rushley* and *E. Beaves* were heard in support of the rule. The judgment sufficiently shews the circumstances of the case, and the points suggested in argument; so far as material to the decision.

Cur. adv. vult.

Lord CAMPBELL C. J., in this Term (January 18th), delivered the judgment of the Court.

This was a rule calling on the defendants, justices of the county of Flint, to shew cause why they should not issue their warrant of distress and sale of the goods of *John Lloyd* and another, surveyors of the highways in, and inhabitants of, the township of *Tryddyn*, for recovery of 72*l.* 8*s.* 3*d.*, by an order of sessions, dated 1st July 1852, ordered to be paid, out of the highway rate for the township, to *Charles Harrison*, for the costs of a prosecution against the inhabitants of the township for the non-repair of a highway.

In this case, by consent, a verdict at Sessions had passed for the Crown; and the costs of the prosecution were directed by the justices to be paid out of the highway rate: this was in pursuance of the power given by sect. 95 of the General Highway Act, 5 & 6 W. 4. c. 50, the words of which are: "The costs of such prosecution shall be directed by" "the justices at such quarter sessions, to be paid out of the rate made and

(a) November 21st, 1853. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

levied in pursuance of this Act in the parish in which such highway shall be situate."

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The words "rate made and levied," &c., do not point merely to any particular assessment already made and levied at the time when the order of sessions issues, but to the highway rate in general; and it was the duty of the persons who were in office at the time the order was made to pay the costs out of any funds then in their hands, or, if they had none, to make and levy a rate for the purpose of putting themselves in funds. If properly applied to, and neglecting to pay costs, which, in the one way or the other they possessed, or might procure for themselves the means of paying, they would be guilty of a breach of duty (a); and what is true of them would apply to their immediate successors. But, unless something more be found in the Act than is contained in this section, the remedy now sought for, to enforce performance or punish neglect of duty, could not be applied: the common law would help the party entitled to costs by a writ of mandamus (b); but the proceeding by warrant of distress and sale must be founded on statute.

Accordingly, for the rule, Mr. Pashley relied on the 103d section, the words of which are, "all penalties and forfeitures by this Act inflicted or authorized to be imposed for any offence against the same, and all balances due from a surveyor, and all costs and charges to be allowed and ordered by the authority of this Act, (the manner of levying, recovering, and applying of which is not hereby otherwise particularly directed,) shall, upon

(a) On the argument, reference was made to *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 5 Com. B. 440.

(b) *Regina v. Clark* (5 Q. B. 887.) was mentioned in the argument.

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proof and conviction of the offences respectively before any two or more justices, either by the confession of the party offending, or by the oath of any credible witness or witnesses (which oath such justices are in every case hereby fully authorized to administer), or upon order made as aforesaid, be levied, together with the costs attending the information, summons, and conviction; by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands of two or more justices before whom the party may have been convicted."

We are of opinion that these words do not apply to the present case, notwithstanding the generality of the expression "all costs and charges to be allowed and ordered by the authority of this Act." The subject matter of the sections are those penalties and forfeitures, those balances due from a surveyor, and all those costs and charges to be allowed and ordered by authority of the Act, "*the manner of levying, recovering, and applying* of which is not hereby otherwise particularly directed." These latter words seem scarcely applicable in themselves to the costs now in question; for the statute has pointed out the specific fund from which they are to be paid (a); impliedly it authorizes and commands the surveyor to pay them from that fund; and the application of them, when paid, it was totally unnecessary to specify: the costs of the prosecution of an indictment being given, it must be intended that they were given to the party prosecuting.

But, waiving that argument, what is to be done in order to proceed under the section? There must be

(a) On the argument, *Regina v. Watford* (4 D. & L. 593.) was mentioned.

either "proof and conviction of the offences (a) respectively," which clearly cannot apply except in cases of offences which cause penalties or forfeitures to be incurred, and, at most, balances to be paid, the non-payment of which is the offence to be proved and convicted of; or there must be an order made, and that order must make it an immediate and direct duty for the party on whom it is made to pay what is ordered to be paid, whether it be penalty, forfeiture, balance or costs; but this cannot apply to the case before us; for, the fund being specified, and that being a rate made or to be made, reasonable time to put himself in funds must necessarily be given to the surveyor. He is guilty of no default until such time has elapsed; if he has to make a rate, that rate may be appealed against to the quarter sessions; considerable delay may occur without any fault of his; and, to suppose that upon order made he becomes at once liable to distress and sale of his goods, or imprisonment, is not only unreasonable, but inconsistent with the 95th section, which gives recourse specially to the highway rate, with all the consequences of course implied to which we have just alluded.

When we proceed with the section, we find that its further provisions are confined to the case of fines, penalties and forfeitures, and the costs made incident to them, and are wholly inapplicable to the present case; and the section concludes with applying the penalties and forfeitures when levied, half to the informer, and half to the surveyor of the parish where such offence, neglect or default shall happen, to be applied towards the repair of the *highways* thereof, unless the surveyor

(a) On the argument, reference was made to *Eggington's Case*, 2 E. & B. 717., and to stat. 43 Eliz. c. 2. s. 4.

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shall be himself the informer, in which case the whole shall be applied towards the repair of such highway, meaning probably *highways*.

Looking then at the whole section, which is very carelessly drawn, it seems to us clear that the object of it is to provide means for the recovery of penalties and forfeitures, and unpaid balances, and the costs and charges incident to the proceedings which may be had for imposing the two former, or for procuring the order for the payment of the latter: all these are summary proceedings; and it is clear that to summary proceedings only the Legislature was looking when it enacted these provisions (a).

The parties applying for the rule, therefore, have mistaken their course; and it must be discharged.

Rule discharged.

(a) *Silkwood v. Mount* (1 Q. B. 726.) was mentioned in the argument.

Monday,
January 30th.

ROBSON against DOYLE Bart., DOUGLAS, WITHAM
and WHITE.

Where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff, under The Common Law Procedure Act, 1852, is to apply at the trial for an amendment under sect. 37. The misjoinder is not such a defect or error as can be amended after the trial by the Court in banc under sect. 222.

ACTION against the four defendants for money paid, work and labour, commission, and on accounts stated.

Plea by *Doyle*: Nunquam indebitatus. The same plea by *Douglas* and *Witham*, jointly. The same plea by *White*.

Issue joined on the three pleas.

The case was tried before Lord Campbell C. J., at the London sittings after last *Hilary* Term. At the close of the plaintiff's case, the counsel for *White* contended that, as against him, no cause of action had been proved. The Lord Chief Justice thereupon suggested to the plaintiff's counsel that he should strike out *White's* name, under sect. 37 of The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.). This was not acceded to; and his Lordship then asked the jury whether they thought the case was proved against *White*. They answered in the negative. Upon this, the counsel for the other defendants contended that all the defendants were entitled to a verdict. The Lord Chief Justice permitted the case to proceed; and a verdict was found against *Doyle*, *Douglas* and *Witham*.

Crowder, for the plaintiff, in this Term, obtained a rule calling on the defendants to shew cause why, on the payment of defendant *White's* costs, the *postea* and proceedings should not be amended by striking out *White's* name, or why a new trial should not be had. Afterwards, in the same Term, *C. W. Wood*, for the defendants *Douglas* and *Witham*, obtained a rule calling on the plaintiff and the defendant *White* to shew cause why a verdict should not be entered generally for the defendants, or a new trial be had: notice to be given to defendant *Doyle*.

The two rules now came on together.

C. W. Wood, for defendants *Douglas* and *Witham*. Sect. 37 of The Common Law Procedure Act, 1852, points out the proper mode of remedying the misjoinder of defendants: that not having been pursued, the case stands as before the statute: and, one of several defend-

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ROBSON the case fails altogether. Whatever shall be done, the
v. defendants are entitled to costs.
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Crowder and *Willes*, for the plaintiff. First, the verdict may stand as against the three. Sect. 37 permits the amendment "in case it shall appear at the trial of any action on contract that there has been a misjoinder of defendants:" it does not state whether this ought to appear to the satisfaction of the jury or of the Judge: it may be that it was intended that the jury should find simply against the parties liable. But, at any rate, sect. 222 enables the Court to make the amendment now. [*Wightman J.* Then what was the use of sect. 37? *Crompton J.* Sect. 34 introduces a series of enactments "with respect to the joinder of parties to actions," down to and including sect. 40.] Sect. 222 seems to be added, in order to comprehend by a general enactment all cases not provided for by the enactments under the several heads of Appearance, &c. [*Crompton J.* If sect. 222 were thus to override the earlier sections, the conditions annexed to the amendment, in sect. 37, could not be secured.] No injustice will be done to *White*, by the proposed course: and why should the other three be exempted from liability?

A

O'Malley, for *White*, consented to the new trial, on condition that *White's* name should be struck out, and that his costs should be paid.

J. H. Hodgson, for *Doyle*, contended that all the defendants were entitled to the costs; or, at least, to the costs of the rule.

Per CURLIAM (a). We can only grant a new trial; and that must be upon an undertaking as to *White*. Sect. 222 clearly has no application to a case of misjoinder.

1854.

ROBSON

v.
DOYLE.

As to *Crowder's* rule: Ordered, that the verdict be set aside without costs as to defendants *Douglas*, *Witham* and *Doyle*, and a new trial be had, and that defendant *White's* name be struck out, the plaintiff undertaking to pay *White* his costs.

As to *C. W. Wood's* rule: Ordered, that the rule be discharged as to the plaintiff: and, as to defendant *White*, that the rule be discharged, with costs to be paid by defendants *Douglas* and *Witham* to defendant *White*.

(a) Lord Campbell C. J., Coleridge, Wightman and Crompton J's.

In the matter of a plaint in the County Court Tuesday,
of CORNWALL holden at ST. AUSTELL between January 31st.
RICHARD KERKIN, plaintiff, and WILLIAM
KERKIN, defendant.

KINGDON, in this Term, obtained a rule Nisi to rescind an order of *Martin B.*, made in the vacation, for a prohibition in the above plaint.

A summons was taken out in the county court by *A.* against *B.*, to recover lands

under stat. 9 & 10 Vict. c. 95. s. 122.

On application for a prohibition by *B.*, it appeared that *B.* held, as tenant to *C.* in his lifetime, two farms, *C.* being leaseholder of the one, and tenant in fee of the other. *C.* died; and *A.* produced a will by which he was devisee of all *C.'s* real estate, and appointed executor. *A.* proved the will, and gave *B.* notice to quit. *B.* bona fide disputed the validity of the will.

Held: that the restriction contained in sect. 58, as to the jurisdiction of the county court when title to corporeal hereditament comes in question, applies to proceedings under sect. 122. That title to the leasehold could not here come in question, inasmuch as the probate was conclusive that the title to that was in *A.* But that title to the freehold did come in question. And the prohibition went as to the freehold farm, and was refused as to the leasehold.

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From the affidavits on both sides it appeared that *William Kerkin* and *Richard Kerkin* were brothers. *William* was the elder son, and in the lifetime of their father had become his tenant from year to year of two farms under the value of 50*l*. The father was owner of the one farm in fee ; of the other he was possessed for a term of years. The father died in 1853 ; and *Richard Kerkin* produced a will by which the estates were both bequeathed to him, and he was appointed executor. This will was proved, on the 3d of *March* 1853, in the Archdeaconry Court of *Cornwall*. Notice to quit was given by *Richard Kerkin* to *William Kerkin* : and, he refusing to go out, a summons was taken out by *Richard Kerkin*, under stat. 9 & 10 *Vict. c. 95. s. 122.*, in the County Court of *Cornwall* holden at *St. Austell*. It appeared by the affidavits that the validity of the will was bonâ fide disputed by *William* ; and on that ground *Martin B.* made the order complained of.

J. D. Coleridge now shewed cause. Stat. 9 & 10 *Vict. c. 95. s. 58.* provides that the Court shall not have cognizance, inter alia, of any action in which the title to any corporeal hereditament shall be in question. Here the very point is, whether *William*, the heir at law, or *Richard*, the devisee, has title to this land. [Lord *Campbell* C. J. The questioning the validity of the will does bring the title of the freehold in question : but the leasehold is in the executor ; and the probate is conclusive as to who is executor. The title therefore to the leasehold land cannot come in question in the county court ; and as to that the prohibition cannot go. As to the freehold, as at present advised I think the order right.]

Kingdon, in support of the rule, was desired by the

Court to confine his arguments to the freehold. Sect. 58 does not apply to proceedings under sect. 122. Sect. 126 shews that questions of title in such cases are to be tried by the county court judge, and that there is a method of appealing by an action of trespass. [Lord Campbell C. J. I at present think that sect. 58 does restrain the jurisdiction under sect. 122. Questions on the validity of devises are frequently of the utmost nicety. I can hardly believe that the Legislature intended the county court to decide such a question as that raised in *Egerton v. Earl Brownlow* (a). Crompton J. The sections following sect. 122 seem to shew that the Legislature contemplates that the county court is to decide on questions of title as to whether the landlord has a lawful right to the possession: that is, such questions as arise from a dispute as to whether the lease was determined, or the like. But it does not contemplate that he is to decide questions as to whether the claimant has title as landlord. Wightman J. referred to *Jones v. Owen* (b).]

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LORD CAMPBELL C. J. For the reasons given in the course of the argument, the plaintiff is right as to the leasehold, wrong as to the freehold; and the rule must be accordingly.

COLERIDGE, WIGHTMAN and CROMPTON Js. concurred.

The following rule was drawn up: "That the order of *Martin B.*, dated &c., "be rescinded as respects the leasehold premises mentioned in the affidavits in the said rule named; and that the rule be discharged as respects the freehold premises in the said affidavits also mentioned."

(a) 4 H. L. Ca. 1.

(b) 5 D. & L. 669.

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COUCH against STEEL.

1st count.
That plaintiff engaged with defendant, to serve on board defendant's (a *British*) vessel, as a common seaman, on a specified voyage from and to a *British* port. Breach: that the vessel was leaky and unseaworthy, by which plaintiff became unwell and sustained damage.

Held, on demurrer, that the count was bad, there being no allegation of knowledge or deceit, nor of any express warranty that the vessel was seaworthy; and the law not implying any such warranty from the relation of shipowner and seaman.

2d count.
That defendant neglected to supply and

keep on board the vessel a proper supply of medicines, whereby plaintiff's health suffered.

Held, on demurrer, that stat. 7 & 8 *Vict. c. 112. s. 18.* makes it the duty of the shipowner to have on board such medicines; and that, though the Act imposes a penalty, recoverable by a common informer, as the specific punishment for the breach of that duty as to the public, sailors sustaining a private injury from the breach of that statutable duty are entitled to maintain an action to recover damages. And that the count was good.

THE first count of the declaration alleged that defendant, then and still being a subject of Her Majesty Queen *Victoria*, was the owner of a certain *British* registered barque or vessel, called and known as *The Persian*, which, at the time of the making of the agreement, was in port within this realm, to wit in the port of *Plymouth*: and plaintiff, then being a subject of Her said Majesty, was then an able bodied seaman in good health, duly registered, and had a register ticket. "And thereupon plaintiff in his own behalf, and defendant by one *John Davis*, the master of the said barque or vessel of defendant, and the agent of defendant in that behalf, made and entered into an agreement in writing, in the form and containing all the matters and things, and made, entered into, signed, dated and attested, in all things, as required in and by the statute in that case" &c.: Whereby it was agreed, by and between plaintiff and defendant (amongst other things), that defendant engaged plaintiff to serve, and plaintiff promised to serve, as a seaman in and on board the said barque or vessel from a certain place, to wit *Plymouth*, to a certain other place, to wit *Aden*, and from the last mentioned place to a certain other place, to wit *Calcutta*,

and from the last mentioned place to a certain other place, to wit *England*, for wages and reward to be paid by defendant to plaintiff in that behalf. That plaintiff shipped himself on board, and served on the voyage out, and performed the said agreement in all things on his part. "Yet the defendant so carelessly and negligently managed, fitted out and equipped the said barque or vessel that, by reason thereof, and of the defendant's neglect and default in respect of the said barque or vessel, the barque or vessel, at the time of her sailing from *Plymouth* aforesaid and commencing the said voyage, was wholly unseaworthy and in a leaky and dangerous condition, and unfit to be sent or to go to sea; and, by reason thereof, the plaintiff was, during the voyage aforesaid from *Plymouth* aforesaid to *Aden* aforesaid, and from *Aden* aforesaid to *Calcutta* aforesaid, unable to sleep in his hammock, and was continually wet; and thereby, and by reason of the excessive and unreasonable labour which the plaintiff was then, during all the voyage aforesaid, compelled, in consequence of the unseaworthy, leaky and dangerous condition of the said barque or vessel, to undergo, the plaintiff, during the said voyage," became sick &c.

Second count. That, whilst defendant was such owner of the said barque or vessel as aforesaid, and before and at the commencement and during all the continuance of the said voyage, and after the making of the said agreement, and whilst plaintiff served on board of the said barque or vessel as such seaman, and under the said agreement, the defendant neglected to provide or keep, and made default in providing and keeping, on board the said barque or vessel a sufficient and proper supply of medicines and medicaments suitable to accidents and

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diseases arising on sea voyage : whereby, and by reason of such last mentioned neglect, plaintiff was unable to be cured of his said sickness on board of the said barque or vessel, and suffered great pain &c.

Demurrer to both counts. Joinder.

The case was argued in last *Michaelmas* Term (a).

T. K. Kingdon, for the defendant. As to the first count. No duty, such as that which seems to be insisted upon, results from the agreement set out in the declaration. It is not alleged that the defendant knew of the unseaworthiness ; and the plaintiff took upon himself the risk as to the state of the vessel. Indeed it does not appear but that the plaintiff knew of the state of the vessel, and made his contract for wages accordingly. The case is like *Seymour v. Maddox* (b), where a duty on the part of the owner of a theatre, to provide for the floor of theatre being secure, was alleged as resulting from his having engaged the party to perform at the theatre : but the Court refused to treat the allegation of duty as a substantive averment of fact, and, being of opinion that no such duty resulted from the relation of the parties, held that no action lay for damages resulting from the insecure state of the floor. So in *Priestley v. Fowler* (c) it was alleged that, defendant having directed plaintiff, as his servant, to carry goods in a certain van, it became defendant's duty to take care that the van was in a proper state of repair ; and the plaintiff complained of injury resulting to him from the improper state of the cart : but it was held that the action did not lie,

(a) November 15 and 16, 1853, before Lord Campbell C. J., Coleridge and Wrightman Js.

(b) 16 Q. B. 326.

(c) 3 M. & W. 1.

no such duty resulting from the relation of the parties. Here there is not even an express allegation of the duty. The case of *Hutchinson v. York, Newcastle and Berwick Railway Company* (a) is also in favour of defendant.

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The second count is founded on stat. 7 & 8 Vict. c. 112. s. 18., which enacts: "that every ship navigating between The United Kingdom and any place out of the same shall have and keep constantly on board a sufficient supply of medicines and medicaments suitable to accidents and diseases arising on sea voyages," according to the scale issued by the Admiralty. But that section imposes a penalty for default; and sect. 62 prescribes the mode of recovering the penalties. This is, therefore, a new right created by statute, with a specific remedy: and no action at the suit of an individual can be brought in respect of such a right. (The Court then called on the other side.)

C. Milward, contra. As to the first count. The language of *Parke* and *Martin* Bs., in the House of Lords, in *Gibson v. Small* (b), is in favour of the existence of a legal duty of the owner towards the mariners to provide that the ship be fitted for the voyage at its commencement. [Lord Campbell C. J. Do they put it on the footing of warranty?] The action here may be considered to be in tort, as in *Levy v. Langridge* (c).

(a) 5 Exch. 343.

(b) 4 H. L. Ca. 353. 370, 404., in Dom. Proc.: affirming the judgment of Exch. Ch. in *Small v. Gibson*, 16 Q. B. 141, which reversed the judgment of Q. B. in *Small v. Gibson*, 16 Q. B. 128.

(c) 4 M. & W. 337., in Exch. Ch., affirming the judgment of Exch. in *Langridge v. Levi*, 2 M. & W. 519.

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The *American* law seems to take the duty for granted; *Maude and Pollock's Compendium of the law of Merchant Shipping*, p. 87, note (i). The case cannot be determined from the analogy of the law of master and servant, or employer and employee, generally; and therefore such cases as *Seymour v. Maddox* (a), *Priestley v. Fowler* (b) and *Wigmore v. Jay* (c) are inapplicable. The servant, and the party employed, may generally examine that on which they are to be employed: a seaman can hardly be presumed to have similar opportunities of examining the ship. [Coleridge J. Is there anything in Lord *Tenterden's* work warranting the doctrine?] He points out generally the seaman's right to be protected by the owner (d); and the right is indeed to be implied from the statutes passed for the purpose of enforcing the details of the owner's duty.

As to the second count. Sect. 18 of stat. 7 & 8 *Vict. c. 112.* gives only a cumulative remedy: the common law engrafts the right of action upon the statutory provision, which is further regulated by stat. 13 & 14 *Vict. c. 93. s. 66., &c.*

T. K. Kingdon, in reply, was desired by the Court to confine his argument to the second count. The duty is not one at common law, but created by statutes which attach a penalty to the infringement of the duty. [Coleridge J. But is that penalty any satisfaction to the party grieved?] It may be: the Court which awards the penalty may, by sect. 62 of stat. 7 & 8 *Vict. c. 112.*, in its discretion direct that half the penalty be paid to

(a) 16 Q. B. 326.

(b) 3 M. & W. 1.

(c) 5 Exch. 354.

(d) *Abbott on Shipping*, p. 174 (8th ed. by *Shee*).

the informer, which discretion was probably intended to be exercised where the informer was the party grieved. [Coleridge J. Even then there can be but one informer, whilst the whole crew may be aggrieved.]

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Lord CAMPBELL C. J. The Court will take time to consider what judgment is to be given on the second count: but we will dispose of the first count now.

The first count discloses nothing more than that the plaintiff had embarked as a seaman on the defendant's vessel; that the vessel was not seaworthy but leaky; in consequence of which the plaintiff became wet and ill. It seems to me that this discloses no contract or legal duty of which there has been a breach, the subject of an action. For aught that appears on this count, the defendant may have been perfectly ignorant of the defects in the vessel, whilst the plaintiff may have examined the vessel before he engaged himself, and have known her state well. Or it may be that both parties were aware of it, and that it was their intention that the seaman should work and fare the harder, and have that considered in his wages. There being no allegation of a scienter, if we held the defendant liable on this count, we must hold a shipowner always liable to an action from every seaman, if, from any accident, a butt having started or the like, the ship was not seaworthy. No such action has ever been brought: this is a case of the first impression, in support of which neither a decision nor even a dictum has been brought to our notice; nor has any legal principle been urged in its support. Mr. *Milward* has referred to some expressions used by *Parke B.* in *Gibson v. Small (a)*; but they do not at all

(a) 4 H. L. Cas. 404.

1854. warrant the position that there is an implied contract
COUCH with every seaman that the vessel is seaworthy, and that
v. if it is not an action will lie. Then, on the other hand,
STEEL. *Priestley v. Fowler* (a) seems to me in principle to be the
same case as this, and to establish that there is no such
contract.

COLERIDGE J. I am of the same opinion. It is not necessary to say how the case would be if there were fraud or concealment. For on this record there is merely a contract to sail on a specific voyage; and there is no allegation of any fraud or moral wrong. The state of the ship may have been such that the defendants and the master may with perfect bona fides have believed her to be seaworthy though she was not. The plaintiff therefore must rely on a general principle, that in all such cases there is an implied contract that the vessel is seaworthy. I think it is enough to say that we are now giving judgment in the year 1853, and that no such action as this has ever been maintained, though, if there were such a contract implied, there must have been numerous instances in which the facts would have supported such an action. The only authority relied on were the dicta in *Gibson v. Small* (b): but these were used with reference to the law of marine insurance; and that is a branch of the law having no analogy to that of the law of contract between shipowner and sailor. There are many doctrines which prevail in that contract, *uberrimæ fidei*, between insurer and assured, which have no place in any other branch of the law. This is in truth a contract between master and servant,

(a) 3 M. & W. 1.

(b) 4 H. L. Ca. 370, 404.

and is to be decided on the principles applicable to that relation.

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WIGHTMAN J. There is no allegation that the defendant knew of the state of the vessel; and the count is founded entirely on an implied warranty that the vessel was seaworthy. There is no authority that such a warranty is implied. The action is of the first impression, founded only on some dicta in *Gibson v. Small* (a). It is enough that these are but obiter dicta, and certainly not an authority for supporting the action, when we consider the innumerable instances in which the cause of action, if it was one, must have occurred. If any cases are in point, they are *Seymour v. Maddox* (b) and *Priestley v. Fowler* (c); for this is a case, in substance, of master and servant.

As to the second count,

Cur. adv. vult.

Lord CAMPBELL C. J., in this Term (*January* 18th), delivered the judgment of the Court.

The declaration in this case contained two counts, to each of which the defendant demurred. In the first count the plaintiff alleged that the defendant was owner of a vessel called *The Persian*; and that the plaintiff agreed with the defendant to serve, and that he did serve, as a seaman on board the vessel, on a voyage from *England* to *Aden* and *Calcutta*; and that the defendant so negligently fitted out and equipped the vessel, that, by reason of such neglect, she was unseaworthy,

(a) 4 H. L. Ca 370, 404.

(b) 16 Q. B. 326.

(c) 3 M. & W. 1.

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whereby the plaintiff became sick and injured in his health. In the second count the plaintiff alleged that, before and at the commencement and during the continuance of the voyage, the defendant, being the owner of the ship, neglected to provide a proper and sufficient supply of medicines suitable to diseases arising in sea voyages, and that by reason of such neglect the plaintiff was unable to be cured of his said sickness, and suffered great pain. At the close of the argument we expressed our opinion with respect to the first count to be in favour of the defendant; but we reserved our judgment as to the second, as we wished to look more particularly at the Acts of Parliament and such authorities as might be found to bear upon the question raised by that count.

There is no allegation, in terms, in the second count of any duty on the part of the defendant to supply medicines for the use of the ship's company; but the plaintiff relied upon the obligation cast upon the defendant by the 18th section of stat. 7 & 8 *Vict. c. 112.*, by which it is enacted "that every ship navigating between the United Kingdom and any place out of the same shall have and keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, in accordance with the scale" which shall be issued by the Admiralty and published in the *London Gazette*; "and in case any default shall be made in providing and keeping such medicines," "the owner of the ship shall incur a penalty of 20*l.* for each and every default:" and, by sect. 62, it is enacted that the penalty may be recovered "at the suit of any person," and, when recovered, shall be applied in part to the informer, and the residue to *The Seaman's Hospital Society*. By stat. 13 & 14 *Vict. c. 93. s. 64.* the duty of issuing a scale of

medicines is transferred from the Admiralty to the Board of Trade; and, by sect. 66, the Board of Trade and local marine boards may appoint proper medical inspectors to inspect the medicines required to be on board. Were it not for the penalty to which the owner of a ship is subjected for not providing and keeping on board a supply of medicines, it seems clear that the action would be maintainable. The enactment provides a benefit for the seamen; and, according to the plaintiff's allegations in the second count, the defendant has violated this enactment; and thereby the plaintiff, being a seaman on board, was deprived of that benefit, and his health was injured. The general rule is that, "where a man has a temporal loss, or damage by the wrong of another, he may have an action upon the case, to be repaired in damages;" *Com. Dig. Action upon the Case* (A). The statute of *Westm. 2.* (1 stat. 13 *Ed. 1.*) c. 50. gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute. See *2d Inst.* 486. And in *Com. Dig., Action upon Statute* (F), it is laid down that, "in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompence of a wrong done to him contrary to the said law." Therefore the simple enactment requiring the supply of medicines would have entitled the plaintiff to an action, in the same manner as if the obligation had been imposed by the common law, or had been expressly included in the ship's articles. However, sect. 18 of stat. 7 & 8 *Vict. c. 112.*, which creates the duty, also makes the party who ought to perform it liable to a penalty for non-performance, to be recovered at the suit

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of any person, and to be applied, in part to the informer and the residue to *The Seaman's Hospital Society*. The penalty being annexed to the offence in the very clause of the Act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the Act. The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except for the particular mode of punishment by a penalty prescribed by the Act. As far as the *public* wrong is concerned, there is no remedy but that prescribed by the Act of Parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant, for which he has no remedy unless an action on the case at his suit be maintainable: and the question is, whether the penalty annexed to the offence concludes the plaintiff who has sustained a special and particular damage, as well as the public, though no part of the penalty is payable to him. If the performance of a new duty created by Act of Parliament is enforced by a penalty, recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or the private wrong; but, by the penalty given in the Act now in question (stat. 7 & 8 *Vict. c. 112.*), compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any, in which it has been held that, in such a case as the present, the common law

right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty, recoverable by a common informer, being annexed as a punishment for the non-performance of the public duty. In a case cited in 1 *Rol. Ab.* 106, *Action sur Case* (M) pl. 16., it appears to have been held that a person having without the King's licence imported cards into *England*, contrary to stat. 3 *E.* 4 (a), he was not liable to an action at the suit of one to whom the King had granted a licence to import cards, paying rent to the King, and who alleged that he was thereby disabled from paying his rent; as the statute provides that the cards unlawfully imported were forfeited, and the remedy given by the statute ought to be pursued. There, however, the prohibition does not seem to have been intended for the benefit of the person to whom the licence was granted, and the damage which he sustained may have been considered as too remote. The case of *Stevens v. Jeacocke* (b) is clearly distinguishable from the present: no duty was, by the statute in that case, imposed upon the defendant: he was only prohibited under a penalty from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the Act, but to forbear to do that which but for the Act he might have done. The cases cited as authorities for that decision are not applicable to the present case. In *Underhill v. Ellicombe* (c) it was held that, where highway rates were

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(a) C. 4. (b) 11 Q. B. 731. (c) *M'Clid. & F.* 450.

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payable by the provisions of a statute which prescribed a particular mode for their recovery, that mode only could be pursued. And in *Doe dem. The Bishop of Rochester v. Bridges* (a) it was held that, a statute having prescribed a particular mode for the recovery of an equivalent for land tax redeemed, no other mode could be adopted for enforcing the payment of the equivalent. In the present case, if the statute had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of the duty imposed by the statute was to recover compensation, undoubtedly that mode only could be adopted; but stat. 7 & 8 Vict. c. 112. has made no provision for compensation to a person sustaining special damage by reason of a breach of the duty prescribed by the Act; nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damage arising from the breach of a public duty; the penalty given by the statute being applicable only to the public wrong, and not the private damage. In the case of *Rowning v. Goodchild* (b) an action upon the case was held to be maintainable against a deputy postmaster for a breach of duty in not delivering a post letter as required by stat. 9 Ann. c. 10., though he was, by the same statute, liable to a penalty for detaining letters (c). The objection was taken, but overruled, the Court being of opinion that, though the duty was created by statute, the action lay at common law. In that case, as in this, the penalty was recoverable by a common informer, and not by the party grieved.

(a) 1 B. & Ad. 847.

(b) 2 W. Bl. 906.

(c) See sect. 10.

Upon principle then, as well as upon authority, as far as we have been able to find any upon the point, we think the second count is maintainable, and that the plaintiff's right, by the common law, to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it, though no actual damage be sustained by any one. The multiplication of vexatious actions, which was to be apprehended if we had not held that the first count of the declaration was insufficient, cannot arise from our supporting the second; for the plaintiff cannot recover upon it without proving that the medicines required by the Board of Trade were not supplied, and that thereby his health suffered; and upon such proof it is fit that he should have a compensation in damages.

Judgment for the defendant on the first count,
and for the plaintiff on the second.

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The Governors of the RUSSELL INSTITUTION,
appellants, and The Vestrymen of the joint
Parishes of ST. GILES IN THE FIELDS and
ST. GEORGE BLOOMSBURY, respondents.

The Russell Institution was founded, according to the prospectus, for the formation of a library of works in ancient and modern literature, the establishment of a reading room provided with foreign and English journals and other periodical publications, and for lectures on literary and scientific subjects. The funds were raised by shares which were trans-

THE Governors of *The Russell Institution* having been rated, as after stated, appealed: and, notice of appeal having been served, a case was stated, by consent of parties and the order of *Erle J.*, under stat. 12 & 13 *Vict. c. 45. s. 11.* The case, so far as material to the points discussed, was as follows.

The rate appealed against is a rate for the relief of the poor of the parishes of *Saint Giles in the Fields* and *Saint George Bloomsbury*, in *Middlesex*, jointly made by the vestrymen of the joint vestry of the said parishes, by virtue of an Act passed &c. (11 *G. 4* & 1 *W. 4. c. x.*, local and personal, public, "For the better regulation of the affairs of the joint parishes of *Saint Giles in the Fields* and *Saint George Bloomsbury*, in the county of

Held: that it was not so entitled, as not being, within the meaning of sect. 1, a "society instituted for purposes of science, literature, or the fine arts exclusively."

Middlesex, and of the separate parishes of *Saint Giles in the Fields* and *Saint George Bloomsbury* in the same county"): whereby the vestrymen of the said joint vestry are empowered to make rates for defraying the expences of relieving, maintaining, employing and managing the poor of the said parishes jointly, and all other expences connected therewith relating thereto, upon the several tenants or occupiers of all lands, houses, buildings, tenements and hereditaments within the said parishes, or either of them; to be allowed and confirmed by two or more justices of *Middlesex*.

The rate in question was made on 28th *October* 1852, and was, on the same day, duly allowed and confirmed.

In and by this rate the Governors of *The Russell Institution* are assessed as below.

Tenant or occupier.	Number.	Rateable value.	Amount of rate at 12d. in the pound.
Governors of <i>The Russell Institution</i> .	Fifty five.	£166	£8 12s. 10d.

The property in respect of which they are so assessed is called *The Russell Institution*, and is situate in *Great Coram Street* in the said parish of *Saint George Bloomsbury*, and comprises a library, a theatre or lecture room, and a news room occupied by them for the purpose of such Institution, and a residence for the librarian, having a separate entrance, but under the same roof, and communicating internally with the other parts of the building. The building also comprises some baths and wine cellars: but these are distinct from the Institution, and are let off, the rents forming part of the income of

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1854. the Institution; and the tenants are separately assessed in the said rate. The premises are held for the residue of a long term of years, at a small ground rent.

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The notice of the grounds of appeal stated in substance that, by virtue of stat. 6 & 7 *Vict. c. 36.* (the Literary society exemption Act), the appellants are not liable to be assessed to the said rate in respect of the part of the building so occupied by them; the barrister referred to in the said Act having certified that this Society is entitled to the benefit of the said Act: and that the said rate ought to be altered or amended by assessing the appellants at the sum of 25*l.* only, as heretofore, for the part of the said building which is occupied by the librarian as his residence.

This Society was instituted in 1808: and its objects are stated in the original prospectus, from which the following are extracts.

“The objects of the Institution are the gradual formation of a library consisting of the most useful works in ancient and modern literature, including in the latter foreign as well as English.”

“The establishment of a reading room provided with the best foreign and English journals, and other periodical publications deserving of attention and encouragement.”

“And an Institution for lectures on literary and scientific subjects.”

“The utility of lectures is sufficiently obvious. The design of those to be delivered at this Institution will be, to afford useful instruction rather than popular entertainment. All that is proposed to be done at the onset is, to provide an apartment suitable for the

purpose. It will be matter for subsequent consideration, whether the success of the establishment will justify the assignment of regular stipends to the lecturers, and whether such a measure will be necessary: but it is proposed that persons desirous of taking advantage of the lectures, and not being proprietors, shall pay for each course a distinct subscription, the amount of which may be regulated by the committee in conjunction with the lecturer."

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The building was not erected by the Society, but was purchased by them of the builder: and the cost thereof with the fittings was 9000*l.*, or thereabouts; which, with the funds for supporting the Institution, was raised by shares of twenty five guineas each, and is now the property of the present holders of such shares. Some shares have become forfeited, and from time to time have been resold for the benefit of the Institution. The shares are transferable: and the present price is much below the original subscription. Persons who are not shareholders may and do become annual subscribers, and, by reason of their subscriptions, are personally entitled to the privileges of proprietors. The members of the Institution and the annual subscribers at the present time amount to about four hundred; and the privilege of resorting to and using the establishment is confined to them, excepting as to the admission to lectures as hereinafter mentioned.

The library contains about 18,000 volumes of works in every department of literature and science, for the use of the proprietors and subscribers. The principal reviews, magazines and other periodicals are taken in, together with books of reference, directories, the mining and railway journals, and railway time tables. The news

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room is supplied with twenty four daily and some of the weekly newspapers : some are filed ; the others are sold at a reduced price for the benefit of the Institution. Lectures are delivered during the season on various subjects connected with science, literature and the arts : and the public are invited to attend them by advertisement in the newspapers. Some of the lecturers lecture gratuitously ; and others are paid out of the funds of the Institution. Proprietors and annual subscribers are admitted to all the lectures. Persons who are neither proprietors nor annual subscribers may be admitted to any of the lectures on paying for their admission. In 1851 and 1852 several soirées, or evening meetings, were held. At these meetings paintings, pieces of sculpture, new inventions in the useful arts, and interesting objects in natural history, were exhibited, and tea and coffee were provided. Tickets entitling persons to admission on those occasions were issued to proprietors only, who were responsible for the price of such tickets. Proprietors were themselves admitted free ; other persons, by means of the tickets so sold. The produce of such sale, after defraying the expences of the soirées, was applied in aid of the funds of the Institution. Many literary and scientific persons attended by invitation.

Besides the building, the Institution is possessed of 4000*l.* in the public funds, purchased with part of the moneys originally subscribed, the dividends on which form part of the income. The Society is supported in part by the rents of the baths and wine cellars, and by the dividends of stock, and in part by the annual contributions of the proprietors and subscribers as after mentioned. The rules provide

that each proprietor shall pay an annual subscription of one guinea. Persons not being proprietors, who are admitted as annual subscribers, pay two guineas each per annum: or, if resident members of a proprietor's family, one guinea and a half. The whole income is applied in defraying the expence of repairs of the building and the other expences of the Institution. And, by the present rules, no dividend, gift, division or bonus, in money or otherwise, can be made unto or between any of the members. This rule was substituted in 1847 for one by which a dividend was divisible amongst the proprietors in certain events.

Till after the passing of stat. 6 & 7 *Vict. c. 36.*, the whole of the premises were rated under one assessment. In 1847 the Society submitted its rules to the barrister, pursuant to the said Act. By his certificate, dated 28th *June* 1847, he certified that this Society was entitled to the benefit of that Act. The Society accordingly claimed to be exempted pursuant to the said Act. In *December* 1847 a rate payer, on behalf of the parish, appealed to the quarter sessions against the said certificate of the barrister: and, upon the hearing of the appeal, the said certificate was quashed, and the Society was rated without allowing any exemption, down to 1849. In 1849 the Society again submitted their rules, with some alterations, to the barrister, who gave his certificate, dated the 2d *August* 1849, that this Society is entitled to the benefit of the said Act. Thereupon, in 1849, the Society appealed to the vestry against the then rate, claiming exemption pursuant to the said Act. This appeal was allowed by the vestry; and the vestry then rated the Governors at 25*l.* for the part occupied as a residence by the librarian only. The Society con-

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tinued to have the benefit of the said exemption down to 28th *October* 1852, the date of the rate now appealed against.

The appellants and respondents mutually agree that the only issue intended to be raised is: Whether *The Russell Institution* is a society within the meaning of stat. 6 & 7 *Vict. c. 36.*, and, as such, entitled to the exemption claimed.

The existing rules of the Society have been duly certified and filed with the clerk of the peace. Copies of the rules accompanied the case, and were to be taken as part thereof; but no further notice was taken of them in the discussion.

“If the Court shall be of opinion that the appellants are liable to be rated in respect of the whole of the property, then the rate is to be confirmed. But, if the Court shall be of the contrary opinion, then the rate is to be amended by striking out the sum inserted as rateable value in the assessment, and by inserting in lieu thereof the sum of 25*l.* rateable value, and by altering the sum inserted as amount of rate from 8*l.* 19*s.* 10*d.* to 1*l.* 7*s.* 1*d.*, or in such other way as the Court shall direct. A judgment in conformity with the decision of this Court, and for such costs as the Court shall adjudge, to be entered by either party at the quarter sessions for *Middlesex* next or next but one after the decision shall have been given.”

The case was argued in last *Michaelmas* Term (a).

Bodkin, for the respondents. This institution is not a “society instituted for purposes of science, literature, or the fine arts exclusively,” so as to be within the

(a) *November* 12, 1853. Before Lord Campbell C. J. and Erie J.

exemption of stat. 6 & 7 *Vict. c. 36. s. 1.* It was founded and is maintained, not for the promotion of knowledge on public grounds, but with a view to the enjoyment of exclusive privileges by the proprietors: indeed originally a dividend was contemplated; though, since 1847, that has been excluded from the plan. The case cannot be distinguished from *Regina v. Gaskell (a)*, where an institution, by which books on scientific and general subjects, journals, and newspapers, were provided for the use of the subscribers, was held not entitled to the exemption of the Act. On the other side, reliance may be placed on *Regina v. Overseers of Manchester (b)*. There, however, the exemption was allowed because the object of the institution appeared to be the diffusion of literature, science and an acquaintance with the fine arts among the public in general: the only privilege confined to the members was that of paying money. But, in *Rex v. Brandt (c)*, a society formed professedly for the promotion of the science of music, and producing in fact that result, but appearing to have primarily in view the gratification of the musical taste of the subscribers, was held not to be entitled to exemption. If the society here were open to any person who chose to become a proprietor, the case might be governed by *Churchwardens of Birmingham v. Shaw (d)*, where the exemption was allowed. The supply of newspapers shews that the accommodation of the subscribers is the primary object: that circumstance is relied upon in the judgments in *Regina v. Gaskell (a)*. It is in fact a club. [Lord Campbell C. J. The public are admitted.] They are admitted to the lectures only, not to the library

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(a) 16 Q. B. 472.

(b) 16 Q. B. 449.

(c) 16 Q. B. 462.

(d) 10 Q. B. 868.

1854. or news room : and only the proprietors and subscribers attend the lectures without payment. [Erle J. Is there any instance of rating a subscription library?] The question would have arisen in *The Earl of Clarendon v. The Rector &c. of St. James's* (a) : but the case was decided on another ground.

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Pashley, contra. The exemption was allowed in the case of a subscription library in *Churchwardens of Birmingham v. Shaw* (b). And it is quite clear that the Court of Common Pleas, in *The Earl of Clarendon v. The Rector &c. of St. James's* (a), would have allowed the exemption, but for the objection that the premises were sublet. It was there argued that *Churchwardens of Birmingham v. Shaw* (b) and *Regina v. Overseers of Manchester* (c) were overruled by *Regina v. Brandt* (d) : but the Court considered those two authorities as binding : and indeed *Regina v. Brandt* (d) was decided on the same day as *Regina v. Overseers of Manchester* (c) ; so that it is impossible that this Court could have meant to overrule one of these cases by the other. The principle upon which *Regina v. Gaskell* (e) was decided is not adverse to the appellants. In that case there was a library only, no lectures. The admission of newspapers cannot destroy the privilege : in many societies devoted to the most profound science, as for instance *The Cambridge Philosophical Society*, newspapers are admitted. [Lord Campbell C. J. What if newspapers only were admitted?] That is scarcely a safe mode of trying this question : pens, paper and ink together afford the means

(a) 10 Com. B. 806.

(b) 10 Q. B. 868.

(c) 16 Q. B. 449.

(d) 16 Q. B. 462.

(e) 16 Q. B. 472.

of writing, though no two of these do so without the third. It cannot be said that newspapers are entirely unconnected with literature: elaborate essays and criticisms continually appear in them. [Lord Campbell C. J. By sect. 1 of stat. 6 & 7 *Vict. c.* 36. the society must "be supported wholly or in part by annual voluntary contributions." Is that so here, where the contributor gets his pennyworth?] It has been repeatedly so held. *Regina v. Overseers of Manchester* (a) has not been distinguished from this case. In *Regina v. Brandt* (b) there was really no more than a club for providing the subscribers with music. In *Regina v. Cockburn* (c) the principal object of the institution was the promotion of skill in the art of war, which clearly was not within the intention of the statute. No inference can be drawn from that case; nor from *Regina v. Jones* (d), where the object was the diffusion of religion; nor from *Regina v. Pocock* (e), where the object was the education of the labouring and manufacturing classes.

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Bodkin, in reply. It must be admitted that, according to the decisions, the contributions are here in part "voluntary." But the exclusive privileges of the subscribers, and the objects independent of literature, science and the arts, such as the obtaining newspapers, take this out of the class of cases where the exemption has been allowed. The arguments urged for the appellants might be urged on behalf of any club maintaining a library for the use of its members, provided it were thought advisable to attempt the attainment of the benefit of the Act by the institution of occasional

(a) 16 Q. B. 449.

(b) 16 Q. B. 462.

(c) 16 Q. B. 480.

(d) 8 Q. B. 719.

(e) 8 Q. B. 729.

1854. lectures. The question is, What is the primary object
 of the Institution?
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Lord CAMPBELL C. J., in this Term (January 18th), delivered the judgment of the Court.

In this case the question submitted to us is, Whether *The Russell Institution* is a society within the meaning of stat. 6 & 7 Vict. c. 36., so as to be entitled to exemption from parochial rates?

The property in respect of which the appellants are assessed to the relief of the poor is situate in the parish of *St. George's, Bloomsbury*, and comprises a library, a theatre or lecture room, and a news room, occupied by them for the purposes of the Institution. This Society was founded in the year 1806, for the following objects, as stated in the original prospectus: 1. The formation of a library consisting of the most useful works in ancient and modern literature; 2. The establishment of a reading room provided with the best foreign and English journals and other periodical publications; 3. For lectures on literary and scientific subjects.

The funds for purchasing the building and supporting the Institution were raised by shares of twenty five guineas each. The shares are transferable. Persons who are not shareholders may, and do, become annual subscribers, and by reason of their subscriptions are personally entitled to the privileges of proprietors. The members of the Institution and the annual subscribers at the present time amount to about 400; and the privilege of resorting to and using the establishment is confined to them, except as to the admission to lectures. The library consists of about 18,000 volumes for the use of the proprietors and subscribers. The principal

reviews, magazines and other periodicals are taken in, together with books of reference, directories, the mining and railway journals, and railway time-tables. Of the twenty four daily newspapers and the weekly newspapers, so taken in, some are filed; and the rest are sold, at a reduced price, for the benefit of the Institution. Lectures are delivered, during the season, on various subjects connected with science, literature and the arts. The public are invited to attend them by advertisement in the newspapers, and are admitted on paying for their admission. The Society is possessed, besides the building, of 4000*l.* in the public funds, and is supported in part by the rents of baths and wine cellars. The rules provide that each proprietor shall pay an annual subscription of one guinea. Persons, not being proprietors, admitted as annual subscribers, pay two guineas each per annum. The whole income of the Society is applied in defraying the expence of repairs of the building and other expences of the Institution. And, by a rule made in 1847, doing away with the right which the proprietors before had to a dividend, it was declared that no dividend, gift, division or bonus, in money or otherwise, can be made unto or between any of the members. There has been a certificate, under the Act referred to, that the Society is entitled to the benefit of this Act.

We are of opinion, however, that we ought to give judgment for the respondents. It is unnecessary to decide whether this be a society supported in part by annual voluntary *contributions*, within the meaning of the Act. There may be ground for contending that *contribution* here does not mean a voluntary annual subscription or *payment* of money for value received,

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or expected to be received, by the party paying, but means a gift made from disinterested motives, for the benefit of others; as it is used in the translation of *St. Paul's Epistle to the Romans* (a); "It hath pleased them of *Macedonia* and *Achaia* to make a certain *contribution* for the poor Saints." The Legislature may have intended to throw an additional burden on the other rate-payers of the parish, by exempting from rateability property before rateable, only where it is occupied for the purposes of a society supported in part by charitable donations, and not by payments made with a view to the personal accommodation and advantage of the members, although the object of their pursuits may be the cultivation of science, literature or the fine arts. According to this construction of the statute, where the society is instituted for purposes of science, literature or the fine arts exclusively, it would still be necessary to inquire whether the annual voluntary contributions, by which the society is supported wholly or in part, are or are not merely the purchase money for benefits to which the contributors thereby entitle themselves.

But we are of opinion that *The Russell Institution* is not a "society instituted for purposes of science, literature, or the fine arts exclusively." One of the purposes was the establishment of a reading room. Now this was not a room in which the members and subscribers might read books taken from the shelves of the library, but where they might read twenty four daily newspapers, the directories, and the railway time-tables. In such publications, besides interesting political, commercial and fashionable intelligence for gratifying curiosity, there may often be found valuable essays on science

(a) Ch. xv. v. 26.

and literature, and able criticisms to improve the taste of the reader in the fine arts. But news must be considered their chief staple; and, from the statement in the case respecting this room, the great object of its establishment seems to be to give the members the amplest means for learning and discussing the news of the day. The object may be very laudable; but we cannot think that the members, while so employed, can fairly be considered as cultivating science, literature or the fine arts. We think that the present case cannot be distinguished from *Regina v. Gaskell* (a), where, there being a society with a library and a news room supported by annual voluntary subscriptions, the Court (including *Patteson J.*) held clearly that it was not entitled to the exemption. Here it is stated that lectures are delivered in the season to members; strangers, who choose to pay, being admitted: but this cannot impress upon the Institution the exclusive character of being devoted to science, literature or the fine arts.

The Russell Institution flourished before claiming the exemption; and we hope that, notwithstanding this decision, it will long continue to flourish.

Bodkin applied for costs. The Court postponed their decision. On the ensuing day, Lord *Campbell C. J.* said: I have consulted my brethren; and we are all of opinion that in such cases the general rule should be to give the victor costs. There is no ground for making the present case an exception.

Judgment for the respondents, with costs.

END OF HILARY TERM.

(a) 16 Q. B. 472.

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CASES

ARGUED AND DETERMINED

IN

HILARY VACATION,

XVII. VICTORIA (a).

The Judges who sat in Banc in this vacation were:

COLERIDGE J.

WIGHTMAN J.

ERLE J.

CROMPTON J.

*Wednesday,
February 8th.*

WILLIAM FREEMAN PHELPS and another *against*
BENJAMIN PREW.

Defendant,
at the trial,
called on a
person, served
with a subpoena
duces tecum,
to produce a

THE declaration averred that *Thomas Poole* had an estate for life in certain premises in right of his wife, and demised them by deed to defendant for a deed; he declined, on the ground that he held the deed as attorney for a mortgagee, and that his client had directed him not to produce the deed, which was one of his title deeds; and the Judge allowed the privilege. Defendant did not call the client as a witness, but proceeded to offer secondary evidence of the contents of the deed. The Judge received the evidence. In the course of the evidence it became necessary to shew the identity of the instrument, which the attorney refused to produce, with one which the witnesses, called to prove its contents, had seen. For this purpose the Judge compelled the attorney to shew the indorsement on the back of the deed; the attorney and also the plaintiff objecting. Defendant had a verdict. On a motion for a new trial,

Held, that a sufficient foundation had been laid for the reception of secondary evidence without calling the client himself on the speculation that he might waive his privilege.

Held, also, that the Judge did right in compelling the production of the deed for identification in the manner mentioned, as that did not involve any disclosure of its contents.

Semble, that, if he had violated the privilege of the mortgagee, it would have been no ground for a new trial at the instance of the party to the cause.

(a) The Court sat in banc on *February* 3d, 6th, 7th, 8th and 18th.

term of years, by which deed defendant became bound to keep the premises in repair during that term. That, during the term and during the life of *Poole* and his wife, *Poole* and his wife assigned to plaintiffs all their interest &c. in the reversion in the premises. Averments of the continuance of the lives of *Poole* and his wife, and of performance of all things necessary to entitle the plaintiff to have the covenant to repair performed by defendant. Breach that defendant, during the term, did not keep the premises in repair.

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Pleas. 1. That *Thomas Poole* had not an estate for life in the premises in right of his wife. 2. That plaintiffs were not during the said term grantees or assignees of the said tenements or of the reversion therein within the true meaning of stat. 32 H. 8. c. 34. Issues thereon. There were other pleas not material to the questions discussed in banc.

On the trial, before *Martin B.*, at the last Assizes for *Somerset*, it appeared that, in 1845, *Poole* and his wife, being in actual possession of the premises, demised them to defendant by deed for seven years from 25th *March* 1846, with a covenant in the lease by defendant to keep the premises in repair; and that, on 1st *October* 1851, *Poole* and his wife by deed conveyed all their estate in the premises to the plaintiffs. It was proved that defendant entered and enjoyed the premises for the whole term, and that the premises after 1851 were out of repair. The deed of conveyance to plaintiffs recited that the premises were subject to and charged with certain mortgage debts: and the habendum was, To hold to plaintiffs "subject and charged as hereinbefore mentioned." There was nothing in the conveyance shewing whether these mortgages were or were not prior in date

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to the lease to the defendant, nor anything expressly shewing that the mortgages were legal mortgages. An objection was made on the part of the defendant that this deed did not prove the assignment of a legal reversion to plaintiffs. The learned Judge refused to stop the cause on this ground: and the defendants proceeded to prove, as their case, that, between the execution of the lease and the assignment, *Poole* and his wife had, in *December* 1846, conveyed their interest in the premises by way of mortgage to a third person, and consequently that the immediate reversion did not pass to the plaintiffs. For this purpose a gentleman of the name of *Dent* was called on, under a subpoena duces tecum, to produce a deed of *December* 1846. He stated that he had in court a deed of that date, but that it was in his custody as an attorney, and that his clients had instructed him not to produce the deed, which was one of their title deeds. He therefore refused to produce it. The learned Judge allowed the privilege claimed. The defendant then called a witness who proved that, in *December* 1846, he had seen in *London* a deed, and a draft from which the deed had been prepared, which he had compared with the deed, and which draft he now had in court. The witness saw this deed executed by *Mrs. Poole*. As the points, on which the judgment of the Court turned, depended upon the manner in which the deed which this witness saw in *London* was identified with the deed which the witness *Dent* refused to produce, it is requisite to detail a portion of the course of proceeding at *Nisi prius*, as reported to the Court by the learned Judge. The questions specified below were put by the defendant's counsel, and were severally formally objected to by plaintiffs' counsel.

Q. What, as far you recollect, are the parcels in that deed? The Judge thought that question could not then be put.

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Q. As far as you recollect, who were the parties to that deed? The Judge thought that question could not then be put.

Q. Did you look at the deed sufficiently to be able to tell who appeared to be the persons who had put their hands and seals thereto? The Judge permitted this question to be put. Answer: I did.

Q. Who were the persons who appeared to have executed the deed? The Judge permitted this question to be put. The substance of the answer was, that, when the witness first saw the deed, it purported to be executed by Mr. *Poole* and by him only, and that the witness afterwards saw it executed by Mrs. *Poole* and the other parties.

The question was then asked, What were the contents of the deed? It was objected: 1st, that no foundation had been laid for giving secondary evidence of the contents of the deed in Mr. *Dent's* custody, inasmuch as Mr. *Dent's* client had not been called, and, if he had been present, he might have waived his privilege and allowed the deed to be read; And, 2d, that the evidence of the contents of the deed, seen in *London* in 1846, was not evidence of the contents of the deed which now was in Mr. *Dent's* custody, inasmuch as it was not shewn to be the same deed. The learned Judge overruled the first objection: and, to obviate the second, he directed Mr. *Dent* to produce the deed and permit the witness to see the outside, and read the indorsement on it, but not the deed itself. Both Mr. *Dent* and plaintiffs' counsel objected to this; but, in obedience to the Judge,

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it was done. The witness identified the deed by its indorsement, and then was permitted to give secondary evidence of its contents, which shewed that the reversion had been conveyed away by way of mortgage, after the lease and before the conveyance to plaintiffs.

The learned Judge then directed a verdict for the defendant on the second issue, with leave to move to enter a verdict for plaintiffs, if there was no evidence for the defendants which ought to have gone to the jury on the second issue. *Montague Smith*, in the next Term, obtained a rule Nisi to enter the verdict accordingly, or for a new trial on the ground that the evidence of the contents of the mortgage deed was improperly admitted.

Crowder and *Barstow* shewed cause, in this Vacation, on *February* 6th (a); when they argued that the recital in the conveyance to plaintiffs, that the premises were subject to mortgage charges, shewed that the subject matter of the conveyance to plaintiffs by *Poole* and his wife was an equitable interest only. And, inasmuch as the covenants could run only with a legal reversion, they contended that, whether the secondary evidence was admissible or not, the verdict for defendants ought to stand. The Court called on *Montague Smith* and *Prideaux* to answer this objection; and they were heard on *February* 7th (b). They argued that defendant, being estopped, as against the original lessors, to deny that they had a legal reversion, was also estopped as to their privies: and that, as there was no evidence in the conveyance of 1851 that the mortgages were subsequent to the lease, the plaintiffs must be taken to be such privies.

(a) Before *Coleridge*, *Wightman* and *Crompton* Js.

(b) Before *Coleridge*, *Wightman*, *Erle* and *Crompton* Js.

They also argued that the charges might, for aught that appeared, be merely equitable. As the Court expressed no opinion on these points, the arguments upon them are omitted. The following authorities were mentioned: *Green v. James* (a), *Doe dem. Welsh v. Langfield* (b), *Pargeter v. Harris* (c), *Bayley v. Bradley* (d), *Doe dem. Prior v. Ongley* (e), *Com. Dig. Estoppel* (D).

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At the conclusion of the argument on these points, the Court took time to consider till the next day whether they would hear the further points argued. On this day, without expressing any opinion on the other points in the case, counsel were called on to argue the point as to the admissibility of secondary evidence under the circumstances.

Crowder and Barstow. Upon this part of the case two points are made by the plaintiffs. They do not dispute that, if a person having a privilege to retain a deed insists upon his privilege, the litigant who cannot enforce the production of the deed may give secondary evidence of its contents. But it is said that the defendant in this case called only the attorney who had the actual custody of the deed, and that he ought to have called the client whose privilege it was. There is no case laying down any such rule. On principle, the party is not permitted to give secondary evidence till he has exhausted all *reasonable* means of obtaining the primary evidence. He is not bound to exhaust all *possible* means. And surely, when an attorney refuses to produce his client's title deed, and gives evidence

(a) 6 M. & W. 656.

(b) 16 M. & W. 497.

(c) 7 Q. B. 708.

(d) 5 Com. B. 396.

(e) 10 Com. B. 25.

1854. that he does so by his client's order, that is sufficient
 PHELPS reasonable ground to justify a judge in admitting secondary
 v. evidence. The rule was granted in deference to the sugges-
 PREW. tion thrown out in *Doe dem. Gilbert v. Ross* (a), which
 was alluded to in the judgment in *Newton v. Chaplin* (b).
 In neither case did the point arise; and in neither judg-
 ment does it appear which way the opinion of the Court
 inclined. Then, further, it is said that, supposing a
 proper foundation for secondary evidence to be laid, the
 mode by which the instrument was identified was im-
 proper. But as to that there are two answers. First,
 the learned Judge did not compel the witness to shew
 the contents of the title deed, but only to allow the
 outside to be seen for the purpose of identification; and
 that was no breach of the privilege. Secondly, if it was
 a breach of the privilege of the witness or of his client,
 that would be a ground of complaint on their part, but
 it was no wrong to the plaintiff; *Patteson J.* states this
 very clearly in his judgment in *Doe dem. The Earl of*
Egremont v. Date (c).

Prideaux, in support of the rule. In *Volant v. Soyer* (d)
 the Court of Common Pleas held that it was part of
 the privilege to refuse to allow the Judge to inspect a
 deed, which was alleged to be a title deed. [*Crompton J.*
 I would not be understood to throw the least doubt on
 that position. It is at least as objectionable that a
 Judge should pry into a person's title deeds as any one
 else; perhaps more so, as there is a greater probability
 of his understanding the defect in the title, if there is
 one. But is the indorsement on the back of the deed

(a) 7 M. & W. 102. 122.

(b) 10 Com. B. 356, 368.

(c) 3 Q. B. 609. 618.

(d) 13 Com. B. 231.

any part of it? You must always ask the introductory question, Have you such a deed? and the witness must answer, Yes, before you can ask him to produce it. If he refuses to produce it, you must not ask its contents: but may you not make the introductory question more precise by asking whether the deed which he refuses to produce has an indorsement on the back? *Wightman J.* Suppose that, instead of saying that he could identify the deed by the indorsement on the back, the witness had said he should know the deed again because he had spilt a bottle of red ink over it, and it had a great red blot on the back. Would you say that it was an infringement of the privilege to ask whether the title deed not produced had a red blot on it? It would seem that the privilege is to refuse to produce the deed at all; *Brard v. Ackerman (a)*, *Volant v. Soyer (b)*. [*Crompton J.* Supposing the evidence to have been improperly obtained, is it not still evidence? Is it not like the cases in which records improperly obtained from the Old Bailey are yet admissible (c)?] In *Doe dem. The Earl of Egremont v. Date (d)* Lord Denman C. J. expresses a strong opinion that the decision of the Judge on such a point might be reviewed at the instance of the party against whom the evidence was improperly produced. And at all events a proper foundation was not laid for the admission of secondary evidence, as the client was not called, and, unless he was called, all means of producing the instrument were not exhausted. The attorney could not waive the privilege; *Taylor v.*

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(a) 5 *Esp. N. P. C.* 119.(b) 13 *Com. B.* 231.(c) See *Legatt v. Tollervey*, 14 *East*, 302, and *Jordan v. Lewis*, there cited, 305, note (a).(d) 3 *Q. B.* 609.

1854. *Blacklow* (a): the client might; *Merle v. More* (b).

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 The fact of the client not being in attendance, and not producing the deed, affords no ground for the admission of secondary evidence; *Regina v. Llanfaethly* (c).

COLERIDGE J. I am of opinion that the rule must be discharged, without its being necessary to come to any decision on the points first argued. The points which have been argued to day are two. The first is, that secondary evidence of the contents of the mortgage deed was not under the circumstances admissible, because the defendant had not done all that he might to exhaust the sources of primary evidence. As to that, the facts were, that the attorney was called, and refused to produce the deed, and stated that he did so because it was one of his client's title deeds, and his client had given him directions not to produce it. It is not contested that, where a document is properly withheld on the ground of the privilege of the person having the custody of it, secondary evidence is admissible; but it is said that, if the client had himself been present, he might have waived the privilege, and allowed the instrument to be produced when called for. Questions of this sort are all resolvable into whether it was reasonable in the Judge at Nisi prius to require more to be done; and, in this case, I think it would not have been reasonable; for there was distinct evidence that the client had ordered the attorney not to produce the deed; and nothing was shewn to lead to the conclusion that if he had been present he would have altered his orders.

But it is further said that the Judge improperly

(a) 3 *New Ca.* 235.

(b) *Ryan & M.* 390.

(c) 2 *E. & B.* 940.

infringed the privilege, by compelling the attorney to produce the instrument for the purpose of identification; and Mr. *Prideaux* argues that the mere production for any purpose is a breach of the privilege. I think, however, it depends upon the circumstances. I agree with him, that the proposed process of identification may at times involve a disclosure of the contents of the instrument; it did so in *Brard v. Acherman* (a); and, when it does, it is objectionable. But, in the present case, it did not involve any disclosure of the contents, and was like the case put, of disclosing that there was a blot of red ink on the back of the deed, which Mr. *Prideaux* was forced to contend would be objectionable. Thinking, as I do, that nothing wrong was done by the Judge, it is unnecessary for me to come to any decision on the question whether the Judge's decision on a question of the privilege of the witness may be reviewed at the instance of the party. I would not however be understood to countenance the idea that it can be so reviewed: my impression is rather the other way.

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WIGHTMAN J. In this case it appears that the defendant proposed to shew the legal estate outstanding in a third party, as mortgagee, and for that purpose called the attorney of that party, who refused to produce the deed, and stated that he did so by order of his client, the supposed mortgagee; and the privilege was allowed. But, in order to give secondary evidence of its contents, it became necessary to identify the deed which was not produced with that which the defendant proposed to prove. Now it is said that the privilege is, not to produce the instru-

(a) 5 *Esp. N. P. C.* 119.

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ment. I doubt that, if the words are understood in the sense that he may refuse to shew the deed; it seems that his privilege is only not to produce the instrument for the purpose of disclosing its contents. It is a possible thing that the man may not have the instrument, which it is sought to prove, at all; and there may be many other cases in which it may be necessary to produce the instrument for the purposes of identification. The objection here is that the witness was compelled to shew the deed and permit an inspection of the indorsement on its outside: but, as that was only for identification, I am of opinion it was no breach of his privilege.

Then it is said that enough was not done to admit evidence of the contents of the instrument, and that the mortgagee himself ought to have been called to ask if, notwithstanding his previous directions not to produce the deed, he would *now* consent to produce it. There is no authority for such a position; for in no case cited did it appear that the client had given directions not to produce the instrument. I think it might be assumed that he continued in the same mind, and that it was unnecessary to call him on the chance that he had repented. And, all being done that could reasonably be required to be done to obtain the primary evidence, the secondary evidence was admissible.

ERLE J. The question is, whether this mortgage deed was taken out of the general rule which requires that written instruments shall be produced in evidence, by being shewn to be within the exception of being a title deed the owner of which insists on his privilege. And the first question must be, whether the attorney was com-

petent to prove that his client, the mortgagee, forbade him to produce the mortgage: and I think he was competent. Next, did the Judge violate the privilege? Now all rules must be construed with reference to their object. The object of the rule requiring the production of original evidence is, to prove the truth. The object of the privilege as to not producing title deeds is, that the title may not be disclosed and examined. The identity of the deed was a fact material to be proved. Was there any disclosure of the title by allowing the outside of the deed to be examined for the purpose of identification? I think not: and I am therefore of opinion that the privilege claimed, not to permit it to be seen, was not within the reason of the rule.

As at present advised, I think the party cannot complain of the breach of the privilege of the witness: but, as the privilege was not infringed, it is not necessary to decide that.

CROMPTON J. It is admitted that, if the Judge did right in admitting secondary evidence, the evidence is sufficient to entitle the defendant to his verdict; and therefore the question comes to be, whether the Judge did wrong. It is said he did wrong in compelling the production of the deed for the purpose of identification. I think that was no breach of the privilege: but, if it had been, I at present entertain a very decided opinion that the party would have no ground of complaint, and that the person who has had an instrument read at the trial cannot be deprived of the benefit of that evidence on the ground that the instrument was improperly obtained from a third person, whether that was the fault of the Judge, the witness, or the party himself. The authorities

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are strong in support of this; for in *Doe dem. The Earl of Egremont v. Date* (a) it was only one Judge who doubted, the other two being contra. And I can see no reason why the plaintiff should be entitled to insist upon the witness's privilege. If therefore it were necessary to decide the point, I should be strongly of opinion that a mistake of the Judge on such a point is not a ground for a new trial, where the evidence has been admitted. Then there is a second point, as it is urged that there is a positive rule that, under such circumstances as these, you must call the client, to see if he will not repent and retract his refusal to produce the deed. I think that would be a most inconvenient rule; for an attorney may hold the deed as attorney for a great many persons, as, for instance, not only for the mortgagee, but for many subsequent incumbrancers; and it would be very hard upon the party, if at the trial he were to be debarred from giving evidence, unless he subpoenaed all those, of whose interest he might never have heard till the attorney named them, on being called on to produce the instrument. I agree with my brother *Coleridge* that the real rule is, that, before giving secondary evidence, you must reasonably prove that you cannot produce the original because of the privilege, and you must prove that to the satisfaction of the Judge who tries the cause. As to *Regina v. Llanfaethly* (b): my brother *Alderson*, in *Jesus College v. Gibbs* (c), speaking of a document in question in that suit, says: "You could not have proved it by secondary evidence, unless the document had been in the possession of a party not bound to produce it. You cannot produce secondary

(a) 3 Q. B. 609.

(b) 2 E. & B. 940.

(c) 1 Y. & C. Exch. 145, 156.

evidence of a document, if a witness *refuses* to produce the original. He does it, it is true, at his own peril; but you have no remedy, except an action against him." And the decision in *Regina v. Llanfaethly* (a) seems to be an application of that doctrine, for which I believe these are old authorities, but which is a principle not applicable to the present case.

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Rule discharged.

(a) 2 E. & B. 940.

The QUEEN *against* The LONDON and NORTH
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HUGH HILL, in last *Easter Term*, obtained a rule calling on *The London and North Western Railway* Notice was given by *D.* to a railway company that by their works they had permanently obstructed a way to the use of which *D.* was entitled as appurtenant to a messuage belonging to *D.*: whereby *D.* was prevented from enjoying the way, and his interest in the messuage was injuriously affected: and the Company were required, in default of their agreeing to pay to *D.* a sum named, to issue their warrant to the sheriff to summon a jury to assess compensation.

The Company issued a warrant, reciting the notice, stating that they did not admit *D.*'s right to the way, or the damage, or the injurious affection; but that they were willing that the amount of the said compensation should be settled as requested in the notice; and they required the sheriff to summon a jury to determine by their verdict the amount of the compensation in respect whereof *D.* by his notice had required the Company to issue their warrant.

The sheriff summoned a jury to try the question in dispute in the warrant. At the inquiry, the jury having been sworn to inquire and assess the compensation and damages in the warrant mentioned, evidence was given for and against the existence of the right. *D.* insisted that the existence of the right was to be taken for granted on the inquiry, and, further, that the right was proved. The Company insisted that the right was disproved, and that the jury ought to be told that *D.* was not entitled to any compensation.

The sheriff told the jury to say whether *D.* was entitled to the way; but, if they negatived this, to say what was the compensation to be paid on the assumption that the right existed.

The jury found that the right of way did not exist, and that on that ground *D.* had not sustained any damage: but, on the supposition that they were to assume its existence, they settled the compensation at 150*l.* This finding was specially incorporated in the verdict; and the sheriff gave judgment thereon that *D.* had not sustained any damage.

This Court, on the application of *D.*, quashed the inquisition, verdict and judgment, upon certiorari: holding:

1. That the jury, under sect. 68 of The Lands Clauses Consolidation Act, 1845, had no

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power to inquire into the right of *D.* to the way, but were bound to assess compensation upon the assumption that it existed.

2. That the verdict was totally bad, and could not be rejected as to the negating the right but stand as to the conditional assessment of the amount.

Per Lord Campbell C. J., Coleridge and Wightman Js.: dissentiente Erie J., who held that the jury had power to inquire into the right.

Company to shew cause why a writ of certiorari should not issue, to remove into this Court the record of a verdict and judgment given upon an inquisition taken by the sheriff of *Warwickshire*, on 13th *April* 1853, by virtue of a warrant of the said *Company*, dated 17th *February* 1853, directed to the said sheriff, to summon a special jury to determine by their verdict and settle the amount of the compensation to be paid to *Charles Dollman* and *Peter Pitt*, in respect whereof they had by their notice and claim required the *Company* to issue their said warrant.

From the affidavit on which the rule was obtained it appeared that the *Company*, under the powers of stat. 9 & 10 *Vict. c. ccclix. (a)*, and in construction of the railway and works thereby authorized, in the latter part of 1851, permanently obstructed a private way leading from messuages and premises in the borough of *Birmingham* belonging to *Charles Dollman* and *Peter Pitt*, as lessees for a term of years, "and which way the said *Charles Dollman* and *Peter Pitt* claimed and alleged, and still claim and allege, to be a way which was of right appurtenant to and used with the same messuages and premises." The messuages and premises being (as deposed) injuriously affected by the obstruction, the attorney of *Dollman* and *Pitt* served a notice and claim on the *Company*: reciting that the *Company* had "entered upon, stopped up, blocked up, and taken away, permanently obstructed, or destroyed, a certain way, passage or road leading from certain messuages and other premises hereinafter more particularly referred to, belonging to us, the undersigned *Charles Dollman* and

(a) Local and personal, public: "For making a railway from *The London and Birmingham Railway* to or near to *Navigation Street* within the borough of *Birmingham*."

Peter Pitt, into a certain public street in *Birmingham*" &c.
 "And the right to use such way, passage or road, for horses, carts, waggons, carriages, and also without the same, and for all other purposes, belongs to us, and has been held and enjoyed by us, and by the person or persons under whom we claim to be entitled, with the messuages" &c. And that the Company had made certain paths, buildings, &c., of a permanent character, by reason whereof, and of certain walls, &c., the way was permanently stopped up and destroyed: "whereby we, and our tenants, servants and others belonging to us, for some time past have been prevented from having the enjoyment of the said way, passage or road, and we, and our tenants, servants and others, are now prevented from having the use and enjoyment of the said way, passage or road; and whereby we, the undersigned, have been prejudiced, and are now prejudiced, in our estate and interest of and in the said several messuages" &c. *Dollman* and *Pitt* then gave "notice that we are interested in, or entitled to, the said several messuages" &c., "in respect of which we claim such way, and so injured as aforesaid, subject to such tenancies as may subsist in the same premises for the residue of a term of 99 years to be computed from" &c. "And we do hereby, in pursuance of the statutes in that case" &c., "give you, the said Company, notice that we require you to pay us compensation in respect of the said way, passage or road, which you have entered upon and taken as aforesaid, whereby our said messuages" &c., "and our estate and interest therein, have been damaged or injuriously affected as aforesaid; and for the aforesaid injuries to the same, and in respect of our estate or interest in

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the said way. And that the amount of our claim for compensation by reason of the premises is 2300*l*." That, unless the Company were willing to pay the 2300*l*., and to enter into a written agreement for the purpose within twenty one days, the claimants desired that the amount of compensation should be settled by a jury according to the provisions of the Act &c., and required them, in that case, to issue a warrant to summon "a jury for settling the amount of the said compensation, as in the said Act or Acts is directed and provided."

The Company accordingly issued their warrant to the sheriff, reciting the notice, and adding: "And whereas we do not admit that the said *Charles Dollman* and *Peter Pitt* are interested or entitled as in the said notice mentioned, or that the claim to the said way is a valid claim, or that they are entitled to compensation in respect of the matters in the said notice and claim specified, or that such damage or injurious affection, as in the said notice is supposed, has arisen or accrued: yet, being willing that the amount of the said compensation shall be settled as in and by the said notice and claim is requested: Therefore, we the said Company do, by this warrant under our common seal, according to and in pursuance of the Lands Clauses Consolidation Act, 1845, and the Act" &c. (9 & 10 *Vict. c. ccelix.*), "and in pursuance of the said request in that behalf contained in the said notice and claim of the said *C. D.* and *P. P.*, require you, the sheriff of *Warwickshire*, to summon a special jury to determine by their verdict and settle the amount of the compensation in respect whereof the said *Charles Dollman* and *Peter Pitt* have by their said notice and claim

requested and required of us to issue our warrant to you."

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The sheriff accordingly summoned a jury to try the question in dispute in the said warrant. The inquiry was held at *Birmingham*, before the undersheriff, assisted by counsel as assessor: and the claimants and the Company appeared by counsel respectively. Evidence was given as to the existence and user of the way. The counsel for the Company contended that there was no evidence of such right of way as was claimed, and called on the assessor to direct the jury that the claimants "were not entitled to any compensation." The counsel for the claimants contended that "it was not competent for the undersheriff or the jury on that inquiry to determine the question whether, as matter of law, such right of way did or did not exist; and that the functions of both, as regarded that inquiry, were limited to determining by their verdict, and settling, the amount of compensation according to the exigency of the said warrant on the assumption that such right did exist:" and further that, the existence of the way, the stoppage and the deterioration in value having been proved or admitted, the only question was the amount of compensation for such damage and injury. The assessor directed the jury "to say, by their verdict, whether there was any such way as claimed before and at" &c. (directing their attention to points of time with respect to which the objection to the right was urged); adding that, if they found in the negative, he was of opinion, and should direct them, as matter of law, that there was no legal right of way to which the claimants were entitled: but, at the same time, he directed them also to say what, on the assumption

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that such right of way did exist, was the amount of compensation to be paid by the said Company to the claimants in respect of such damage and injury occasioned by the stoppage thereof." The jury found: "That there was no way such as claimed existing at" &c. (the points of time before mentioned); "but that, on the supposition that they were to assume the existence of such legal right of way for the purposes of the said inquiries, they settled the amount of compensation at 150*l*." The following instrument was then executed.

"*Warwickshire* to wit. A verdict and judgment delivered and given in *Birmingham*, in the county of *Warwick*, this 13th day of *April* 1853, by virtue and in pursuance of the Lands Clauses Consolidation Act, 1845, and of an Act" &c. (9 & 10 *Vict. c. cciv. (a)*), "and of another Act" &c. (9 & 10 *Vict. c. ccclix.*), "upon a certain inquisition held before" &c. (the sheriff), "upon the oaths of" &c. (the jurors), "good and lawful men of the said county, qualified" &c., "and now here duly impannelled and sworn by the said sheriff, under and in pursuance of a certain warrant hereunto annexed" &c., "directed to the said sheriff, and delivered by the said Railway Company to the said" &c. (the sheriff), "as such sheriff, to be executed in due form of law."

"*Warwickshire* to wit. Be it remembered that heretofore, to wit on" &c. The warrant was then recited, the delivery of it to the sheriff, the summoning by him of the claimants and the Company, for the purpose of striking a special jury, their attendance accordingly, the

(a) Local and personal, public: "To consolidate the *London and Birmingham, Grand Junction, and Manchester and Birmingham Railway Companies.*"

striking of a special jury "for the purpose aforesaid, in manner directed by the said Act," the reduction of the jury to twenty, the summoning of the jury, the appearance of the parties, the coming of eleven jurors, and the consent of the parties that the question in dispute in the said warrant mentioned shall be determined by the verdict of a jury consisting of" &c. (the eleven). "And thereupon the said" &c. (the jurors) "are now here duly impannelled and sworn by me, the said sheriff, by and with such consent as aforesaid, and do make oath before me, such sheriff as aforesaid, truly and faithfully to inquire and assess the compensation and damages in the said warrant mentioned: and, having viewed the said several messuages, tenements and other hereditaments in respect of which the question in dispute in the said warrant mentioned has arisen, and having heard what was alleged by the counsel learned in the law for both the said parties, and the evidence adduced before them, the said jury: They, the said jury, upon their oath as aforesaid, do say that the said *Charles Dollman* and *Peter Pitt* were not, at the time of the said construction by the said *London and North Western Railway Company* of the said railway, or extension, and the station, works and conveniences connected therewith, in the said notice mentioned, entitled to, nor had they, any such right of way as in the said notice mentioned, or any right of way whatever leading from the messuages" &c., "in the said notice referred to, into a certain public street in *Birmingham*" &c., "as in the said notice they claim to have had and enjoyed. And, on that ground, the said jury do find and determine that the said *Charles Dollman* and *Peter Pitt* have not sustained any damage whatever by the said exe-

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cution of the said works of the said Company. But the said jury further say that, if they are obliged by law to assess and determine the amount of compensation payable to the said *C. D.* and *P. P.*, in respect of the said works of the said Company, upon the assumption that, at the time of the said construction thereof, the said *C. D.* and *P. P.* were entitled to the said alleged right of way, and that the same was obstructed and obliterated by such works as mentioned in the said notice, then, and in such case only, they the said jury do assess the amount of such compensation at the sum of 150*l.* Which said verdict I, the said sheriff, do hereby sign, according to the form of the statute in such case made and provided."

(Signature of the sheriff.)

"Which said verdict being so as aforesaid given and signed: Now therefore I, the said sheriff, before whom the said inquisition hath been holden, do hereby, at *Birmingham* aforesaid, on the day and year first aforesaid, in pursuance of the statute in that behalf made and provided, pronounce and give judgment upon the said verdict: That the said *Charles Dollman* and *Peter Pitt* have not sustained any damage whatever by the said construction of the works of the said Railway Company.

"In witness whereof, I" &c. (signed and sealed by the sheriff).

In last *Michaelmas* Term (a),

Sir *F. Kelly*, *Mellor* and *Bovill* shewed cause; and *Hugh Hill* and *Willes* were heard in support of the rule.

(a) November 10, 1853. Before Lord Campbell C. J., Coleridge, Wightman and Erie Js.

The course of the argument will fully appear from the judgments.

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Cur. adv. vult.

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In this Vacation (*February* 18th), there being a difference of opinion on the Bench, the following judgments were delivered seriatim.

ERLE J. Upon a motion for a certiorari to remove an inquisition held under The Lands Clauses Consolidation Act, 1845 (a), sect. 68, for settling the amount of compensation that might be due from the Railway Company to the landowner in respect of lands alleged to be injuriously affected by reason of an obstruction of a private way said to be appurtenant to the lands, the question has been raised, Whether, on such an inquisition, there is jurisdiction to try the existence of such a right of way.

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The landowner alleges that there is no jurisdiction: and he relies upon the words of the section, "if any party shall be entitled to any compensation in respect of any lands" "injuriously affected," "such party may have the" amount "settled by" inquisition. These words, he contends, import that the title to the compensation is a condition precedent to the power to hold the inquisition; and that, therefore, the injurious affecting described in the claim must be taken to be admitted as the title to that compensation, and the inquiry consequently confined to settling the amount which ought to be paid in the event that the claim of the alleged way should in a future action be proved to be true. And, in

(a) Stat. 8 & 9 Vict. c. 18.

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further support of this construction, he observes on the inconvenience (a) likely to arise from the opposite construction in allowing a tribunal to try a right of way, which is supposed to be incompetent for that duty.

But I am of opinion that upon this inquisition there was jurisdiction to try the right of way, as incidental to the question of the amount of compensation to be paid for lands injuriously affected.

Throughout the legislation on this subject, the title to the land is kept distinct from the rights belonging to that land. Upon the title depends the person who is to receive the compensation: upon the rights depends the quantum of compensation to be paid.

With respect to the title to the land, provision is made to constitute a party litigant to meet the railway company, and settle the amount that is to be paid: and, if this party litigant represents parties who would be under disability from acting, or if he turn out to have no valid title, the amount so settled is to be paid either into Chancery, or over in such other way that the parties entitled shall, after their title has been ascertained by the proper tribunals, receive their due. Then also, in respect of the amount to be paid, provision is made to enable the railway company to settle speedily and finally what that amount is, so that, by paying it over either to the claimant or in the statutable way, they may become owners, and carry on their works without

(a) As to the weight of this consideration, reference was made in argument to *Regina v. The Eastern Counties Railway Company*, 2 Dowl. N. S. 945. As to the extent of discretion to be exercised by the Court, in granting a certiorari, reference was made to *Regina v. The Manchester and Leeds Railway Company*, 8 A. & E. 413.; and *Regina v. The Committee Men for the South Holland Drainage*, 8 A. & E. 429.

delay or doubt; that prompt and final settlement of the amount, without the risk of protracted litigation, being also of great importance for the claimant where his title is undisputed, as is forcibly explained by Lord *Truro* in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (a).

The provisions thus given for settling the amount are given in detail in the sections preceding sect. 68 (b), which relate to claims *before* the land has been taken or injuriously affected. If the claim is under 50*L.*, it is for two justices; if above 50*L.*, it is to be settled, either by agreement if the landowner and company can agree on the amount; if they cannot, then the landowner may elect to proceed by arbitration; and, if this is rejected or fails, the amount must either be settled by a jury or the amount claimed may be taken to be the amount due, if the company refuse to hold an inquisition and are found liable to make some compensation in an action. When the amount is thus settled before the taking or injurious affecting, by the way of agreement, the landowner will of course take into consideration all the rights of ownership that will be injuriously affected, whether ways, waters, lights or other advantages. Among these the first and almost universal matter of claim is on account of severance, which is the obstruction of the previously existing power of passing from one part of the estate to another. And this power of passing may be either directly from one field to another of the same

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(a) 3 *Macn. & G.* 155.

(b) As to the incorporation of the preceding sections in sect. 68, reference was made to *South Eastern Railway Company v. Richardson*, in Exch. Ch. (*Hil. Vac.* 1852), affirming the judgment of C. P. in *Richardson v. The South Eastern Railway Company*, 11 *Com. B.* 154.

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owner, or indirectly from the one field by a right of way over the land of a third person to the other field: and such a right of way may either be used to increase the amount of compensation by the landowner, if it is to be obstructed, or to diminish that amount by the railway company in case the direct passage from one field to another is obstructed, but there is left open a convenient passage by means of the alleged right of way. But, if the parties cannot agree on the amount, and arbitrators are resorted to, they would have to take the same matters into their consideration, and, among the rest, the same question of the right of way. And in the remaining case, if arbitrators are not made available, and a jury is resorted to, all questions relative to settling the amount of compensation are to be inquired into and considered, and finally decided by them, in the same way and to the same extent as would have been done by agreement or by arbitration. The law appears to me to be so expressed: and the constant usage in fact, as far as I can discover, appears to have accorded with the law so understood.

It is to be noted that neither the right of way nor any other right is tried and decided in the same in which that result would occur where the question was raised and decided between the respective owners of the dominant and servient tenements. As between them, the question would remain the same after the imposition as before: but, as between the owner of the dominant tenement and the railway company, and as far as relates to the amount, if any, to be paid for injuriously affecting the supposed right by the works of the railway company, the question would be answered and finally disposed of. It should be further noted that, throughout these pro-

visions for settling the compensation before the land is taken or injuriously affected, there is no expression to prevent the jury from finding that no compensation is due. According to these provisions, the claim, if disputed, may be affirmed or negatived by the jury; and, if affirmed in whole or in part, damages may be assessed accordingly in the same manner as would occur in an action for the same grievance.

Thus a legal machinery is provided for the settlement of the amount of compensation in these different modes.

If it is done by agreement, the sections from 6 to 15 operate: if by justices or arbitration, sections 16 to 37 apply; and, if by a jury, sections 38 to 57 apply. And the machinery, thus fully prepared, is frequently adopted by a short reference in subsequent enactments. Thus sections 95 to 98 adopt it for copyhold lands; sections 99 to 107 adopt it for rights of common; section 124 adopts it for interests in land which were not known when the land was taken. And stat. 8 & 9 *Vict. c. 20*. (The Railways Clauses Consolidation Act, 1845) *s. 6*. adopts it, by enacting that, in exercising their powers, the company shall be subject to the provisions and restrictions contained in the Lands Clauses Consolidation Act, and shall make to all parties interested in any lands injuriously affected full compensation for all damage sustained. And sect. 68 of the Lands Clauses Consolidation Act, 1845, is a correlative enactment to that last mentioned, giving the right to the landowner to obtain from the company compensation in all cases not otherwise specially provided for, where lands have been injuriously affected by reason of the works of the company. And the words of sect. 68 are express to adopt the provisions before created; for, if the claimant elects

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to proceed by arbitration, the amount of compensation is to be settled "in the manner therein provided;" and, if he elects to have a jury, a warrant is to issue to summon a jury for settling the same "in the manner herein provided;" that is, in the previous sections.

In each case the provision for constituting a party litigant to meet the company is altered according to the circumstances. Thus for copyholders and lords of manors the provision is in analogy to that for freeholds; for commoners, a committee must be appointed to represent the body. And, as, when the amount is to be settled *before* the land is taken or injuriously affected, the company are to take the initiative by sending a notice to the landowner, so when this is to be done *after* the taking or injurious affecting, as is the case under sect. 68, the landowner is to take the initiative by sending a claim to the company. But in all the cases, as soon as the parties are constituted, and the question is raised, and the kind of settlement elected, the operation of the machinery provided for that kind of settlement is the same. The question depends on analogous considerations in all, and is tried and decided to the same extent and with the same result in all. The jury, on settling the question of amount, are bound to try all questions incidental thereto, such as questions of rights to ways or other easements; while effect will be given to the words "if any party shall be entitled to any compensation in respect of any lands" "injuriously affected," by holding that the company may raise the question of the claimant being the party so entitled in some other proceedings.

I, therefore, think that the jury, under sect. 68, had jurisdiction on this occasion. The decisions have been

in accordance with this construction. Thus it has been held that the provisions for a special jury, and for notice of holding the inquisition, and for costs, contained in the earlier sections, are adopted by the reference to them in sect. 68, according to the authorities cited by *Mr. Hill* in his argument. And it was decided, in *Regina v. Lancaster and Preston Railway Company (a)*, that the jury might find that no damage had been sustained; in other words, that the lands had not been injuriously affected. This decision has been repeatedly cited in different Courts, uniformly with approval; and it appears to me to be expressly in point for the validity of the verdict now under consideration. The claim for compensation for injuriously affecting land by obstructing a way appurtenant thereto is in its nature a claim for severance damage. The existence of the way is incidental to the settling the amount of damage from the alleged obstruction. The company might shew that it never existed, or had been diverted, or passed in another direction, where there was a tunnel or a bridge, either to negative or diminish the amount of damage claimed: and the landowner might go into evidence to the opposite effect for a similar purpose. If the jury may legitimately decide that there was no damage, it seems to me to follow that, as incidental thereto, they might decide that no way had been obstructed; that is, that the way claimed did not exist. This decision would leave the question of the way unaffected as against all other parties except the railway company; and, as to that body, would only decide that the compensation due for the alleged obstruction was nothing.

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(a) 6 Q. B. 759.

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According to this construction of the section, the inconvenience of assessing damages subject to the contingency that the claim should be proved in an action, and, in case of failure to establish every part of the claim in the action, assessing again, subject again to the same contingency, would be avoided. All questions incidental to the amount of compensation would be finally decided by arbitration or a jury; while all questions incidental to the question of the title of the claimant to receive that amount would be for other tribunals.

With respect to the supposed inconvenience of referring to a jury, under the guidance of the sheriff, the trial of a right to an easement, one answer is, that the right is only tried as incidental to the question of damages for one obstruction; and a further answer is, that the landowner need not refer it to a jury, but may elect a competent arbitrator; and, if he prefers a jury, he cannot be heard to complain of their incompetency: while the company, if they choose to run the risk of being liable for the amount claimed, may refuse to summon a jury; and then the claimant's action for that amount would raise the question, whether the lands had been injuriously affected at all, as is mentioned in *Regina v. Metropolitan Commissioners of Sewers* (a). And a further answer is, that the Legislature has expressly empowered the jury to try all questions incidental to the amount of compensation in the earlier and detailed sections for settling the amount, and also has referred to the same jury more complex questions of law and fact in respect of manorial profits under section 96, and of commonable rights under sect. 105. The Legislature

(a) 1 E. & B. 694.

therefore saw no objection on account of this supposed inconvenience.

This construction accords with the result of the cases in Chancery upon this section.

Lord *Cottenham's* judgment in *The London and North Western Railway Company v. Smith* (a) indirectly supports it. For he adopted the opposite construction, that the jury in the inquisition were to assess the amount of compensation without trying any right, and that the right was to be tried in a subsequent action; and he considered the inconvenience to be so excessive that he prohibited by injunction a recourse to the statute so construed.

Lord *Truro*, in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (b), directly supports it, holding that the jury may try the question of right in assessing the amount of compensation. And Lord *Cranworth* also expressly so decides in an elaborate judgment in *South Staffordshire Railway Company v. Hall* (c).

In the two last cases it is laid down that, if the jury on the inquisition try a question of right over which they have no jurisdiction, the company in an action for the amount found by the verdict may raise for trial that same question of right, and succeed if the judgment is in their favour. It seems to me that this principle so expressed is correct; but it requires further explanation to define what questions are within the jurisdiction of the inquisition, and what are not. The distinction, between questions of title to the land and right to easements and advantages belonging to the land, is clear: and sect. 124

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(a) 1 Macn. & G. 216.

(b) 3 Macn. & G. 155.

(c) 1 Sim. N. S. 373.

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of this statute affords an example, in providing compensation for the owner of an estate or interest in land which was unknown when the land was taken. In this case, if the title to the estate is disputed the question of title must be first finally established by law in favour of the party claiming it: and, if not disputed, or if established, then compensation is to be afterwards settled in the manner before provided in the Act. The statute does not declare why the trial of the title should in this case precede the settlement of the compensation, and in other cases follow it. It may be that the title to an unknown estate would be more frequently bad. But, be that as it may, the statute recognizes and provides for two different modes of trial of the two classes of questions, questions of title to land and questions of amount of compensation.

The case of *Chabot v. Lord Morpeth* (a) is a further example of the same distinction. Upon the inquisition to settle the compensation for the land of the claimant, his opponent contended that he had no title to a part of that land, and so reduced the amount of the value of the land in question by so much estate and interest as any other person possessed adverse to the claimant. The Court says that the jury "had no materials for making that reduction, or deciding whether" any other claimant "had the whole estate and interest in the premises, or none at all." The jurors' duty "was to estimate the value of the property taken," "the person in possession being deemed entitled to the whole interest until the contrary be shewn (sect. 45 (b)), and the case of doubtful titles being provided for (sect. 44 (b)) quite in-

(a) 15 Q. B. 446.

(b) Of the *Battersea Park Act*, 9 & 10 Vict. c. 38.

dependently of the jury's assessment." Now, though this judgment was in respect of the Act for *Battersea Park*, the distinction under it is applicable to claims under the Lands Clauses Consolidation Act, 1845 : and, if in that case the claimant *Chabot* had endeavoured to enhance the amount of compensation by alleging that easements belonged to the land, according to my understanding of the case the jury there would have had jurisdiction to try the right to such easements.

Between these two classes of questions the distinction is sufficiently marked. But in the cases in Chancery a distinction is noted between questions relating merely to the amount of compensation for injuriously affecting land, and questions relating to the legal nature of the damage to the land. Was it such as gave the claimant a legal right to compensation for that damage? In the case before Lord *Cottenham*, the question in his mind seems to have been as to the legal right to compensation where a street in a town had been stopped up, at some distance from the claimant's house, but to his damage. Was the damage too general, and was it too remote to give a legal right to compensation? In the case before Lord *Truro*, part of the claim was for impeding the access of customers along a street to a shop. The doubt here might be the same. In the case before Lord *Cranworth*, part of the claim was for not putting gates where a farm road crossed a railroad ; and for this inconvenience a specific remedy was given in the statute. And it was said that the claimants should pursue that remedy, and so had no right to compensation.

It was in respect of this class of questions, when the title is admitted and the damage in fact is admitted, but the right to compensation for such damage is denied, that

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the two last mentioned Judges expressed an opinion that, if the jury upon the inquisition tried them and found for the claimant, and gave damages, still the railway company could raise them again in an action by the claimant for the amount found by that verdict. According to this opinion, the finding of the inquisition against the claimant upon any question within this class would be final, but a finding in his favour upon it would be open to review in an action. And Lord *Truro's* observations in favour of that right in the railway company will be found worthy of attention when the question shall arise.

But in the present case the question is not raised. The railway company admit the title to the land, but deny that it has been in fact injuriously affected; which they have a right to do, according to *Regina v. Lancaster and Preston Railway Company (a)*. And, if in support of their denial they disprove an alleged right of way, or any other alleged advantage in respect of which the claim for damages was made, they are, as it seems to me, within the limits of the jurisdiction of an inquisition for compensation under this statute.

It follows that in my judgment the present rule should be discharged.

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COLERIDGE J. This was a rule for a certiorari to remove an inquisition, which had been taken by the sheriff of *Warwickshire* upon a claim of compensation in respect of obstruction to a right of way, which Messrs. *Dollman* and *Pitt* insisted on as appurtenant to certain premises of which they were possessed as termors.

(a) 6 Q. B. 759.

The defendants denied their right to the premises, the existence of the right of way, and also disputed the amount, 2300*l.*, which Messrs. *Dollman* and *Pitt* claimed for compensation. The notice of the claim, however, being given under the Lands Clauses Consolidation Act, 1845, sect. 68, and a refusal to issue the warrant to the sheriff involving the risk of paying the whole amount claimed, should the claimants establish their right to any thing in an action, the warrant was issued. Before the jury, the claimants, who had to begin, after protesting against being called on to give evidence of any thing but the amount of damage, did in fact go into their whole case. The defendants met that case by evidence. The sheriff's assessor held that the jury were competent to try all the questions, and left them to their decision. The jury found in the nature of a special verdict, negating the right of way, but awarding contingently 150*l.* for compensation.

In shewing cause, two points were made: 1st. That the assessor's direction to the jury was right, and that the jury was competent to try the question of title; 2d. That, even if not, their verdict for 150*l.* might stand, rejecting the other part as surplusage.

This latter point was not much pressed: and we may dispose of it first and shortly. It appears to me that there was much in one answer made by Mr. *Willes*, that we cannot feel sure that the jury have dealt with the question of value on the assumption that there was no right of way, in fact, as they would have done if they had taken for granted that there was. Such a question would very probably present itself to their minds in a very different way after an inquiry, and a conclusion in their minds that the claim was

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unfounded, from that in which it would have done if it had come to them neatly and without prejudice. But, besides this, there are formal difficulties in the way of so dealing with the finding. The sheriff has given judgment upon the verdict as returned; he has signed both verdict and judgment; and they are now become records, not of this Court, nor within our jurisdiction to amend; they are made evidence: and it might lead to great confusion if we were to sanction the notion that any distinct finding in fact is to be considered merely as surplusage under such circumstances as these. This answer to the rule, therefore, cannot be sustained; and it is necessary to decide upon the main and very important question of the extent of the province of the jury.

The 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 *Vict. c. 18.*, on which the question turns, commences in this way: "If any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction," "and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit."

The person, then, who may proceed under this section is one who is entitled to compensation. About this there can be, and we believe has been, no question: it must be a condition, whether precedent or subsequent, to his deriving any benefit from its provisions. But this, being assumed, bears materially on the inter-

pretation of that which follows. The arbitrator or the jury is to settle the compensation claimed; which claim is made by one supposed to be entitled, and for which compensation, so supposed to be due, the promoters have not made satisfaction. But, if the complainant be supposed to be entitled, as the ground upon which the reference has been made to the arbitrator or the writ issued to the jury, as the proceeding before either is *coram non judice* supposing there be no title in the complainant, it would seem to follow that neither the one nor the other is competent to try that question: they are called in because the promoters have not made satisfaction (words significant in themselves) to a party entitled to compensation for damage sustained: unless he were entitled, and unless the satisfaction due had been withheld, it would seem that they ought to assume they never would have had the case before them. But for the concluding provision of the section, to which I shall draw attention presently, I should have thought little question would have been made on this: for then, whenever the promoters disputed the title of the complainant to any compensation, they would have refused to refer, or to go before a jury: the complainant would have applied to this Court for a mandamus, in which proceeding that previous question would have been conclusively settled. In that case, we suppose that, *upon these same words*, it never could have been contended that either arbitrator or jury had any jurisdiction to try whether the party was entitled. But how, in strict reasoning, can the meaning of these words be altered, because in effect the proceeding by mandamus is taken away, on the ground, we presume, that it was thought expensive or inconvenient, and another mode

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1854. of trying the same question substituted, which may be
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 v.
 LONDON The section goes on, first, providing for the alternative
 and NORTH of arbitration; and here the promoters must go before
 WESTERN that tribunal, unless they are willing to pay the amount
 Railway claimed, and shall, within twenty one days after notice
 Company. received, enter into a written agreement for that pur-
 pose: and, secondly, providing for the other alternative

Lord thus: "if the party *so entitled* as aforesaid desire to have
 Campbell C. J., *such* question of compensation settled by jury," he may
 Coleridge J., "give notice in writing of such his desire to the promoters,"
 Wightman J. "stating such particulars as aforesaid, and unless the
 promoters" "be willing to *pay the amount* of the compen-
 sation so claimed, and enter into a written agreement
 for that purpose, they shall, within twenty one days after
 the receipt of such notice, issue their warrant to the
 sheriff to summon a jury for settling the same in the
 manner herein provided."

Here let us stop to observe on the particulars to be
 stated in the notice. They are "the nature of the"
 claimant's "interest in such lands in respect of which he
 claims compensation, and the amount of the compensa-
 tion so claimed." Whether "interest" or "lands" be
 the antecedent to the relative "which" (which may be
 doubtful), nothing here points to title: the "nature of
 the interest" is material as to the question of amount,
 and amount only.

Then the section proceeds: "and in default thereof"
 (that is, if the promoters do not issue their warrant,
 "they shall be liable to pay to *the party so entitled* as
 aforesaid the amount of compensation so claimed, and
 the same may be recovered by him, with costs, by action
 in any of the superior Courts." The section, then, is

clear as to the consequences where the promoters will not issue the writ: the claimant can then recover nothing unless he be entitled; that question, therefore, will then come to be tried in an action, with all the advantages of a superior tribunal and a court of error; but the question of amount is closed: if the claimant establishes his title, the judgment must be for the full amount claimed. This would seem to be a penalty imposed for declining the settlement of the amount by the tribunal which the Legislature had given the claimant his option of having recourse to: and, *so viewed*, limiting the question before the statutory tribunal, the sheriff's jury, to the question of amount, there is nothing hard or unreasonable, or contrary to legal analogies, in the provision: nothing is more common than for mere questions of amount to be so disposed of both at common law and by statute; but the same cannot be said if the only alternative for the promoters was to have the question of right and title also decided by that tribunal.

In this way, however, in the case supposed, of a refusal to issue the writ, the question of right is decided. How is it to be decided if the writ be issued, and the jury are not to entertain it? The section, it will be observed, is silent as to all particulars after the issuing of the writ: and, if we refer back to the previous sections, from the 41st to the 50th inclusive, which provide for the proceedings before the same tribunal in respect of the purchase and taking of lands, it will be found that, although the verdict and judgment are made records, they are not made records of any superior Court; nor is there any express provision for any writ of execution to issue for enforcing them. The consequence is, that

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and, assuming that the sheriff's jury have no jurisdiction to try the title to compensation, that question will come in issue upon the trial of that action; and so the question of title will ultimately be decided in this case exactly as where the writ has not been issued at all, and with all the same advantages. I agree with Lord *Cottenham*, giving judgment in *The London and North Western Railway Company v. Smith* (a), in his remark that it is an inconvenient and unreasonable course to try the amount first and the title last. I think he points out how the Legislature came so to ordain: from the desire, namely, to prevent the having recourse to mandamus: but the inconvenience of this proceeding *inverso ordine* is certainly not so great as that of submitting the question to be tried by the sheriff's jury without a competent direction, and with no recourse to any Court of Review or writ of error.

I must now proceed to inquire, how far the decisions which have been made on this section interfere with or confirm the view to which an examination of the statute alone has led us. The point has repeatedly come indirectly before the Courts of Equity.

In the case I have just referred to, Lord *Cottenham* restrained a party from proceeding under the statute until he had established his right in an action at law. He did not, in terms, decide whether the jury could or could not enter on the question of right; but he clearly proceeded on the ground that their finding on it would not be conclusive: he treated them as assessing damages only, *the right to recover which, after all, would have to be*

(a) 1 *Mucn.* & *G.* 216.

established in an action on the judgment. When, therefore, the title was in dispute, he thought it was inequitable to enforce the legal right to the ascertainment of the damages before that had been settled, because it might be a fruitless litigation, and therefore restrained the claimant. Though he decided no more than was necessary, nothing shews that he contemplated for a moment the sheriff's jury entertaining the question of title, which, upon his argument, if they did, they could conclude nothing upon. So far, therefore, as his opinion is pronounced at all, it agrees with the view I have taken.

This point, however, came to be considered by Lord *Truro* in *The East and West India Docks and Birmingham Junction Railway Company v. Gattke* (a). It was not, however, necessary for the decision of the case to pronounce upon it; and the case was decided upon another point. Nor do we find that his Lordship anywhere expresses a clear opinion that the jury are competent to decide the question of right. He says, indeed, that they have repeatedly decided questions upon the construction of clauses in the Act which have arisen incidentally and indirectly before them; a power necessarily incident to the trial even of the question of amount, proving nothing as to the extent of direct jurisdiction; and he approves of the judgment of this Court in *Regina v. Lancaster and Preston Junction Railway Company* (b), in which we upheld the finding by a jury that the claimant had sustained no damage. But we did so on the ground, not that the jury might

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(a) 3 Macn. & G. 155.

(b) 6 Q. B. 759.

1854. go beyond the question of amount, but, in the words of Lord *Denman*, because "the question, whether any damage has been sustained or not, is inseparable from the question, how much damage has been sustained," and, in the words which I then appear to have used, that, "though the inquiry may go only to the quantum, that quantum may be nothing." On the other hand, he contrasts the course he was desired by the bill to pursue with the course prescribed by the statute, which he describes thus: "going to a jury and assessing the compensation and *leaving the question of his right to be afterwards decided*" (a). This case was followed in order of time by that of *South Staffordshire Railway Company v. Hall* (b), in which Lord *Cranworth*, then Vice Chancellor, dissolved an injunction upon its authority, which he had granted upon the authority of *The London and North Western Railway Company v. Smith* (c), considering Lord *Truro* to have, in effect, overruled it, and acting of course in accordance with the last authority of the Court of Appeal. He decided nothing, but acted as Judge of an inferior Court according to the decision of the Court of Appeal. It is right, however, to state that his Lordship expresses himself, on consideration, dissatisfied with Lord *Cottenham's* decision.

Again, and later in the same year, came on the case of *The London and North Western Railway Company v. Bradley* (d), before Lord *Truro*, who acted

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(a) These words were read from 20 *L. J. (N. S.) Ch.* p. 223. The corresponding passage is in 3 *Macn. & G.* 173.; where, however, the particular expression does not occur.

(b) 1 *Sim. N. S.* 373.

(c) 1 *Macn. & G.* 216.

(d) 3 *Macn. & G.* 336.

upon his former decision. *The Sutton Harbour Improvement Company v. Hitchens (a)*, a still later case, before the Lords Justices *Knight Bruce* and Lord *Cranworth*, in *December* 1851, was cited, in which a similar injunction to restrain proceedings under the statute was dissolved on appeal.

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I have gone thus carefully through the authorities cited from the Court of Chancery, because much reliance was placed on them in the argument, and from the sincere respect which is due to whatever falls from Judges so distinguished. But, in truth, they conclude nothing on the very point now to be decided. In all these cases the question was one purely of equity. Has the company an equity which entitles it to the interference of the Court, to restrain the complainant from pursuing that legal remedy which the statute has given him? And it is now settled, contrary to the opinion of Lord *Cottenham*, that it has not. He said: The remedy was so inconvenient and oppressive, that he would compel the complainant to establish his right to it by an action at law first. The answer has now been: Be it so; the remedy may be inconvenient; but the statute has given it, under the circumstances, in lieu of the remedy by mandamus, which it took away: and, that being so, where it is bonâ fide pursued and not for dishonest and oppressive purposes, equity will not interfere to prevent a party from having recourse to it. It is true that Lord *Cottenham* expressed an opinion that the jury could not meddle with the question of title; and that aggravated the inconvenience of the remedy. But the Judges who have differed with him, one of

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(a) 1 *De G. M. & G.* 161. See *S. C.*, before Lord *Langdale M. R.*, 13 *Beav.* 408.

1854. whom (Lord *Truro*) seems to have thought that the jury may consider (not conclusively determine, be it observed) the question of title, do not decide the cases before them on this narrow ground, but on the broad ground, that the statutable remedy, be it more or less inconvenient, is a legal right, with which equity will not interfere, unless there be some other ground than the necessary hardship involved in its mere use.

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Lord *Truro*'s opinion, however, on which all the subsequent cases turn, is entitled to much consideration. It is founded on two grounds: first, that the jury has always considered questions upon the construction of the section arising incidentally before them. But, with great respect, this practice, however well founded, proves but little: wherever the inquiry as to the principal matter is within the competence of any tribunal, whatever, incidentally arising, bears upon that, must, ex necessitate, for the purposes of that inquiry, be within its competence also. It is in this way that Courts of Common Law occasionally deal with questions of Ecclesiastical or Maritime law, and vice versâ. In this way judges at *Nisi prius* sometimes dispose of questions of fact: and instances of the same kind might be multiplied indefinitely. When, therefore, in order to determine the amount, it is necessary to settle whether this or that statement of a claim shews it to be of a kind which is within the section (and this was the sort of question which occurred in several of the equity cases), the jury must, as well as they can, with such help as they have from the sheriff or his assessor, decide the point: for, unless they did so, they could not ascertain the amount of compensation. Lord *Truro*'s second ground is: that the point has clearly been decided by the Courts of law:

and this, therefore, will bring us to the examination of the cases relied on by him, and in the argument before us, which is the only remaining topic of inquiry.

The first of these cases, *Regina v. The Eastern Counties Railway Company* (a), was a case upon the return to a mandamus, arising and decided long before the passing of the statute we are now construing; and, according to the reports of it in 2 Q. B. and 11 *Law Journal* (b), some points which are noticed by Lord *Truro* as having arisen in it do not seem to have arisen: certainly they are not noticed in the written judgments: if so, it had no bearing whatever in the present question. The same may be said of *Rex v. The Directors of the Bristol Dock Company* (c). *Corrigal v. The London and Blackwall Railway Company* (d) was upon a local Act prior to the passing of stat. 8 & 9 *Vict. c. 18.*: and it was an action upon the sheriff's judgment after a verdict by the compensation jury: and, so far as it has any bearing on the present case, the question arose on the fourth plea, in which, by way of invalidating the inquisition, it was alleged that evidence was given before the jury, not only of the loss in respect of good will, tenant's fixtures and otherwise, by the taking of the dwelling house, but also of loss sustained in respect of the dwelling house by reason of the construction of the railway; whence it was inferred, in argument, that the sum assessed by the jury was composed of damages given in respect of both those grounds of injury. The Court, however, thought that the mere fact of the evidence having been given could not affect the validity of the verdict; "for," say they, "such evidence may have been given to shew that the house had

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(a) 2 Q. B. 347.

(b) 11 L. J. (N. S.) Q. B. 66.

(c) 12 *East*, 429.(d) 5 *Man. & Gr.* 219.

1854. *been deteriorated, which was necessary to give the jurisdiction to the sheriff and jury:*" and, as to the inference of fact, they held that it was excluded by the language of the verdict itself. The words which we have cited from the judgment are the only words which bear on the present question. The Act (a) empowered the jury "to inquire of, and assess, and give a verdict for the sum of money to be paid for the purchase," "and also the sum of money to be paid by way of satisfaction" &c. "for good will, improvements, tenant's fixtures, or for any injury or damage whatsoever." The claim was under both heads: but, as the right to insist on either was founded on the house having been deteriorated in the course of constructing the railway, it may be inferred, from the words cited, that the Court thought it a relevant subject of inquiry by the compensation jury, in order to the founding of their own jurisdiction. To this extent it is adverse to our construction of the statute before us: but it is a remark not founded on any previous argument, but on an assumption; it was used to meet an objection of a totally different kind from that we have been considering: and it was quite unnecessary to make it; for the language of the verdict shewed that the evidence, whether properly or improperly admitted, had not been allowed to enter into the calculation of the damages. *Williams v. Jones* (b) is upon another point; and *Regina v. Lancaster and Preston Railway Company* (c) we have already noticed incidentally. All that any member of this Court there said was upon the

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(a) 6 & 7 W. 4. c. cxxiii., local and personal, public, "For making a railway from *The Minories* to *Bluckwall*, with branches, to be called 'The Commercial Railway.'" See sect. 22, in note to 5 *Mun. & G.* 231:

(b) 13 *M. & W.* 628.

(c) 6 *Q. B.* 7:9.

power of the jury to consider any question which affected the quantum of damages.

These are all the decisions at law to which Lord *Truro's* judgment refers. But, in the argument against the rule, the case of *Regina v. Metropolitan Commissioners of Sewers* (a) was referred to: but that case, so far as it is relevant, supports the rule: it was decided, however, on the special words of the Act there under consideration, which, in terms, limited the functions of the jury to questions upon amount only (b).

On the other hand, *Chabot v. Lord Morpeth* (c) was referred to, which, although not on the same statute, nor precisely in point, contains observations from the Bench which favour the argument of the present complainant.

The result of the whole examination appears to be, that the question now to be determined has never yet received direct and considered decision.

As before intimated, we think that the words of the section, as well as the justice and convenience of the case, are against the course taken upon this inquisition. It is admitted that the sheriff's jury cannot conclusively determine the question of title: that in itself is an argument against their entering upon it at all, on the ground of delay and expense. It must be admitted, also, that, even for a preliminary and inconclusive trial, they are an unsatisfactory tribunal, and their decision additionally objectionable, because no error in the direction given to them, nor any mistake, or even perverseness, in their finding can be reviewed, as in a trial

(a) 1 E. & B. 694.

(b) It was suggested, in argument, that the power of the jury to inquire into title was assumed in *Regina v. Great Northern Railway Company*, 14 Q. B. 25.

(c) 15 Q. B. 446.

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at Nisi Prius. Experience, moreover, shews that an inconclusive preliminary inquiry is very often not merely useless, but has a tendency to interfere injuriously with the conduct and result of the second and conclusive inquiry. The question once examined and found upon does not come before the jury on the second trial perfectly free from prejudice.

Upon all these grounds I think the rule to remove the inquisition should be made absolute.

Lord *Campbell*, who has read this judgment, desires me to express his concurrence; and he states that he takes the same view as I have done of the case of *Regina v. Lancaster and Preston Railway Company (a)*.

My brother *Wightman* also concurs in this judgment.

Rule absolute.

The inquisition, verdict and judgment having been returned (*b*), *Hugh Hill*, in *Easter* Term 1854, obtained a rule calling on the Company to shew cause why they should not be quashed: and, in the same Term (*May* 6th, before Lord *Campbell* C. J., *Wightman* and *Crompton* Js.), Sir *F. Kelly* appeared on behalf of the Company, and *Hugh Hill* in support of the rule, which was made absolute without discussion.

(a) 6 Q. B. 759.

(b) The warrant, also, was returned. But *Hugh Hill*, in *Trinity* Term 1854 (7th *June*), moved that the warrant should be taken off the files of the Court, and remitted to the sheriff of *Warwickshire*, on an affidavit stating that the claimants had required the sheriff to execute the warrant by summoning a jury, and that the sheriff had answered that he had returned the warrant with the inquisition &c. The Court (Lord *Campbell* C. J., *Erle* and *Crompton* Js.) made the order as prayed for.

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HUGH HILL, in last *Michaelmas* Term, obtained a rule Nisi for a mandamus to the justices of *Worcestershire*, commanding them to enter continuances in the matter of the enrolment of a certificate, under the hands of two justices in and for *Worcester*, that they had viewed a highway proposed to be diverted, and to hear an appeal against the same.

The affidavits set out as an exhibit the certificate of the two justices. It commenced by reciting that, on the application of the surveyors of the highways in the township of *Upper Swinford* in the parish of *Old Swinford*, they had viewed certain highways for foot passengers, described in the certificate, and also a proposed new highway, which *Richard Hickman* was desirous should be established in lieu of part of the highways, before described, in a manner described in the certificate; and, after stating, in substance, a compliance with the directions contained in stat. 5 & 6 *W. 4. c. 50. s. 85.*, the two justices certified that they had viewed the proposed diversion, and that the proposed highway was more commodious for the public than the existing one. The certificate was lodged with the Clerk of the Peace.

Two justices made a certificate, under stat. 5 & 6 *W. 4. c. 50.*, for the diversion of a highway. The certificate stated that the justices had on the application of the surveyor of the highways viewed the highway proposed to be diverted &c., but did not shew that the surveyors were authorized to make the application. On appeal, by a party interested, the Sessions held the certificate bad on this ground, and refused to proceed further.

A rule Nisi having been obtained for a mandamus to enter continuances and hear the appeal:

Held: that the appellate jurisdiction, given to the Sessions by stat. 5 & 6 *W. 4. c. 50.*, was not limited to the points mentioned in sect. 89, but was general; and that consequently the Sessions had jurisdiction to entertain the question whether the certificate was good or bad; but that, having exercised their jurisdiction, mandamus did not lie, even if they were wrong.

Held, also, that the certificate was defective, as not shewing that the preliminaries necessary to give the two justices jurisdiction to certify had been complied with.

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Notice of appeal to the Quarter Sessions was given, by a person who considered himself aggrieved: in the notice of appeal were eight grounds of appeal. Several of these were on the merits: but the Sessions decided only on the first; which was: "That the said certificate is defective and bad upon the face thereof, because it omits to state that the surveyors, at whose request it is alleged the said justices viewed the highways sought to be diverted, had first duly obtained the consent of the inhabitants of the said parish, in vestry assembled, to the proposed diverting of the said highways, after a notice in writing, from the party desirous of diverting the same, requiring the said surveyors to convene a meeting for the purpose of obtaining such consent, or that the said surveyors were at the time of their said request to view in possession of, and acting under, an order in writing of the chairman of a meeting of the said inhabitants in vestry assembled." When the appeal came on before the Quarter Sessions this objection was taken, and argued; and the Quarter Sessions, being of opinion that the certificate was insufficient, refused to hear the case further, or to enter on its merits.

Selfe and H. J. Hodgson, in last *Hilary* Term, shewed cause (a). This being a rule for a mandamus, it is immaterial whether the Sessions have decided rightly or wrongly, if they have in fact exercised their jurisdiction; *Regina v. Blanshard* (b). [Lord Campbell C. J. If, supposing a peremptory mandamus awarded, the justices

(a) *January* 26th. Before Lord Campbell C. J., Coleridge, Wightman and Erle Js.

(b) 13 Q. B. 318.

would be required, in obedience to it, to decide on the very point on which they have already decided, the mandamus will not lie. On the first day of this term (*a*) we refused a rule Nisi in the nature of a mandamus, because it was, in effect, to order the justices to adjudicate in a particular way.] The cases are uniform to the effect that, if the decision is wrong, there may be a remedy by appeal or by writ of error, but that the remedy by mandamus is applicable only where there has been a declining to exercise jurisdiction. [Lord Campbell C. J. Do you go so far as to say that any bonâ fide decision on the form of the certificate must be an exercising of jurisdiction? Suppose, to test the principle, that the Sessions had decided that the certificate was bad because the letters "i" were not dotted, or on some such frivolous objection.] It may be a necessary qualification, that the ground of decision be one which may reasonably be entertained. Perhaps, in an extreme case, it would be held that such a decision as that suggested could not be a judicial decision. In the present case the decision was right. Wherever an authority is limited, the proceedings must shew on the face of them that the act done was within the

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(*a*) Wednesday January 11th, 1854. *Regina v. Justices of Bristol.*

Sir A. J. E. Cockburn, Attorney General, moved for a rule, in lieu of a mandamus, under stat. 11 & 12 Vict. c. 44., calling on the justices of *Bristol* to shew cause why they should not commit and punish a person of the name of *King*. The justices had refused to convict him, under the erroneous impression that the Act under which the information was laid had been repealed. [Lord Campbell C. J. Stat. 11 & 12 Vict. c. 44. s. 5. substituted a rule for a mandamus, but gave no jurisdiction to this Court to interfere where they could not do so by mandamus. However erroneous the decision may have been, the justices have heard and determined the matter; and we have no power to interfere.]

Per Curiam (Lord Campbell C. J., Coleridge, Wightman and Crompton Js.),

Rule refused.

1854. authority; *Christie v. Unwin* (a). Here the authority is given by stat. 5 & 6 *W.* 4. c. 50. sects. 84 to 92. Before that Act, the jurisdiction to divert a highway was by an order under stat. 55 *G.* 3. c. 68. s. 2. It was held that an order under that statute was bad unless it shewed that the provisions of that Act had been complied with; *Regina v. Jones* (b). The present Highway Act, 5 & 6 *W.* 4. c. 50., repeals stat. 55 *G.* 3. c. 68., and by sect. 84 enacts that, "when the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expences attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act: Provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expences aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this

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(a) 11 *A.* & *E.* 373.

(b) 12 *A.* & *E.* 684.

Act; and the said surveyor is hereby required to make such application as aforesaid." And sect. 85 enacts that, "when it shall appear upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted or turned, either entirely or subject as aforesaid, so as to make the same nearer or more commodious to the public," they shall direct notices to be given, and make a certificate which shall be lodged with the Quarter Sessions, and, after four weeks, shall be enrolled in the records of the Quarter Sessions. Sect. 88 gives an appeal to the Quarter Sessions by any party aggrieved; and sect. 91 provides that, if there is no appeal, or if it is dismissed, the Quarter Sessions shall make an order for diverting the road, and that "the proceedings thereupon shall be binding and conclusive on all persons whomsoever." The first step in the whole of this machinery is to have a parish meeting, and an order from the chairman of that meeting to the surveyor. And there is good reason for this, as the parish will be liable, under sect. 92, to the repair of the new highway; and it may well be that the new highway may be nearer and more commodious for the public, and yet the repairs of the new highway be so much more costly than those of the old one that the interests of the parish require that the deviation should not take place. The provision requiring that the vestry should originate the proceedings before a highway shall be diverted seems inserted for the same reason as the proviso, in sect. 23, requiring that the vestry shall be consulted before a new highway is dedicated to the public so as to cast the burthen of repairing it on the parish.

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Hugh Hill, Huddleston and J. J. Powell in support of the rule. The decision was on a matter which formed no part of the legal merits. In *Regina v. Stacey* (a), where the Sessions had erroneously, on a technical objection, annulled a certificate of the barrister appointed to certify the rules of Friendly Societies, the order of Sessions was removed into this Court by certiorari, and a rule to quash it discharged: but *Patteson J.* said: "In substance the Sessions treated the matter as a mere nullity, and therefore did not go into the merits of the appeal. The respondents should have applied for a mandamus to hear the appeal." [Lord *Campbell C. J.* I have great respect for the opinion of that learned Judge: but, if he did say that a mandamus would lie in that case, I cannot agree with him. But I doubt whether he did say it; for in the report of the same case in the *Queen's Bench Reports* no such dictum appears (b).] The Sessions have no jurisdiction in such an appeal as this, to enquire into the form of the certificate. Their duties are defined by sect. 89, which enacts that "in case of such appeal the Justices at the said Quarter Sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said parties appealing would be injured

(a) 19 *L. J. N. S. M. C.* 177; *S. C.* 14 *Q. B.* 789.

(b) According to the note made at the time for the *Queen's Bench Reports*, the learned Judge does not appear to have expressed any opinion that a mandamus would lie, but to have suggested to the counsel: "if, as you say, the Sessions have not heard the appeal, you should have applied for a mandamus, not for a certiorari."

or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such Quarter Sessions; and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said Court of Quarter Sessions shall dismiss such appeal, and make the order herein mentioned for diverting and turning and stopping up such highway either entirely or subject as aforesaid, or for diverting turning, and stopping up of such old highway," "or for stopping up such unnecessary highway either entirely or subject as aforesaid; but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public, or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid." This limits the jurisdiction on appeal to an inquiry into those points, and no others. [*Coleridge J.* If the vestry had ordered the surveyor not to go on, and he notwithstanding did go on, there must surely be some mode of stopping him.] Probably; but not by appeal, which is not of common right, but only the creature of the Act. Perhaps the remedy would be by quashing the order as made without jurisdiction. The proceedings of the two justices are regulated by sect. 85. They are to act when requested by the surveyor; but they have no power to inquire

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1854. whether he has been duly authorized; and the certificate need not shew anything on the face of it into which the justices could not enquire; *Taylor v. Clemson* (a). [Lord Campbell C. J. It is impossible to contend that the objection is so clearly wrong and frivolous that we should say it could not be the subject of judicial decision. The case is therefore reduced to the question, Whether the Sessions have jurisdiction to enquire into the validity of the certificate, or their appellate jurisdiction is limited: which is a question of difficulty and importance.]

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Cur. adv. vult.

COLERIDGE J., in this Vacation (*February 18*), delivered judgment.

This was a rule for a mandamus to the justices of the peace for the county of *Worcester* to hear and determine an appeal against the enrolment by them of a certificate by two justices of the peace, for the diversion of a highway and the stopping up of the old road. Upon cause shewn, it appeared that the appeal had been called on, and the appellants had proceeded to point out objections apparent on the face of the certificate. The Court had entertained these objections, heard arguments on both sides, decided in favour of the appellants on one, and refused thereupon to proceed any further towards the enrolment. We had no doubt, upon the argument, that the decision of the Court upon this objection was correct, and that the point on which it arose was a substantial one, disposing of the appeal on its legal merits. Nor was this matter in the end very seriously

(a) 11 *Cl. & F.* 610., affirming the judgment of the Exchequer Chamber in *Taylor v. Clemson*, 2 *Q. B.* 978. See also *Ostler v. Cooke*, 13 *Q. B.* 143.

contested : but it was very strongly urged that, since the passing of stat. 5 & 6 W. 4. c. 50. (the general highway Act), the Sessions had no jurisdiction to inquire into defects on the face of the certificate; that the certificate was merely an instrument by which the question upon the merits in point of fact was brought before the Court; and that, when so brought, the certificate had done its work : that then the jurisdiction of the Quarter Sessions was original, and not appellate, and limited to the trying by a jury of the three questions stated in the 89th section of the Act. We have considered this matter, and are of opinion that there is no foundation for the argument.

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The provisions now in force for the stopping up, diverting or turning highways are contained in the 84th and seven following sections. After the two viewing justices have been properly set in motion, and after they have given the notices, had the view, and satisfied themselves upon certain points stated in the 85th section, they are, by that section, required to make a certificate; and the Legislature has minutely and anxiously specified, in that section, what particulars that certificate is to contain, what facts it is to state, what conclusions of the justices, and the reasons for them, and with what proof of preliminary notices and what plan it is to be accompanied. This certificate is to be lodged with the clerk of the peace for inspection during a limited period, and, after certain preliminaries, is to be ultimately enrolled.

In its form, this instrument at this stage purports to be a certificate rather than an order: yet in the following section, and before the Sessions have done any act in regard to it, it is called "order or certificate;" and, in

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the following sections, these terms seemed to be used indifferently in speaking of it; and this may have grown out of its somewhat anomalous character: it is an order in the sense of its being the subject of an appeal; unless appealed against by any one who thinks that he should be aggrieved, if what it recommends, rather than orders, to be done should be carried into effect, that recommendation will be carried into effect by a substantive order of sessions; it is no order in terms if not appealed against; but it will be made the strict foundation of a subsequent order. This distinction however of terms is immaterial; for it is clear that an appeal is given against it whatever it may be. Sect. 87 speaks of what the Court may do in the way of partial or entire *confirmation*, "in the event of *any appeal* being brought against the whole or any part or parts" of it. Sect. 88 expressly gives an appeal. Sect. 90 provides for the costs of the appeal. Sect. 91 directs what shall be done in case there be no appeal; and sect. 89, the consideration of which we have purposely reserved, introduces for the first time certain new provisions in case of appeal. It is idle therefore to talk of the jurisdiction of sessions not being appellate: the only question can be, What are the limits of the appellate jurisdiction?

This turns upon two points. First, it is said that the words of sect. 89 limit the action of the justices at sessions to the trying certain questions by a jury: second, that no inference can be allowed, even if these words are not in themselves exclusive, to raise an appellate power beyond them. The words are these: "in case of such appeal the justices at the said Quarter Sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to

the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury." The jury so impanelled is to find upon these questions of fact; and, according to their finding, the justices are to allow or disallow the appeal. These words it is clear are not in terms exclusive; nor do they embrace all the supposable cases in which serious objections may exist to the confirmation of the certificate; in terms the Legislature does not say, Let a jury be impanelled to determine the appeal; but, Let it be impanelled to determine certain questions of fact: those were questions which, under the previous highway Acts, the justices themselves, as judges both of law and fact, were accustomed to determine; and, in a great majority of cases, upon these questions the fate of the appeal will depend; and these questions will be the last that will come into discussion; the trial of them supposes all other questions decided in favour of the certificate; for both reasons the section goes on to say that, according to the finding on these, the judgment of the sessions shall be. The words then not being in terms exclusive, nor in themselves embracing, as we shall presently see, all the matters upon which questions may arise fit to be settled, before the certificate be confirmed, the second question arises upon the inference as to the extent of the appellate jurisdiction. It is undoubtedly true that appeals from the orders of an inferior statutory jurisdiction do not arise except by statutory provision, and, if not created by express affirmative language, can only arise by an inference absolutely necessary, and where language is used which is tantamount to express enactment: but,

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There remains however to be mentioned a part of the

(*a*) Sect. 3.

entire subject which was not brought before us upon the argument, but which appears to us to be conclusive as to the proper construction of the statute. The certificate, as we have before stated, must contain certain statements, and be accompanied with a plan of a certain kind, and proof of certain facts: in the case of *Regina v. The Newmarket Railway Company* (a) we pointed out the important purposes which the Legislature intended to secure by this provision. This certificate, when lodged with the clerk of the peace in order to inspection and subsequent enrolment, may be either appealed against or not. If the latter, sect. 91 of the statute comes into operation, and the justices at sessions must make their order for diverting or stopping up as the case may be. But they can have no other materials on which to frame their order than the certificate. What are they to do if, upon the face of it, it be so defective as to give them no certain information? What, if the plan does not contain the requisite measurements? What, if the proof does not shew proper notices given? If they still make an order upon it, as it is, they must proceed by guess work, without being sure that they are doing what the justices certified as proper to be done, or that the parties interested have had the proper notice. If they hear evidence, and seek to supply the defect, they cannot still be sure whether they are carrying into effect the thing originally intended to be certified, or some other thing by which some party interested may be aggrieved, and against which, if he had had the statutory opportunity, he would have appealed. These consequences are so serious, that we

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conclude that it is the duty of the sessions, where there is no appeal, to be satisfied that the certificate comes before them correct on its face, and accompanied by plan and proof, such as the statute requires. Unless this be done, neither the public, nor interested individuals, will have the protection which the statute intended.

But, if this be the duty of the justices at sessions and within their competence, when there is no appeal, how can it be maintained that, when there is an appeal, it is less a part of their duty, and not within their competence, to decide upon the very same questions if presented to them by the appellant. It must be trusted to the court to determine what apparent defects are merely formal and no grievance, and what are substantial; but, assuming the certificate to be substantially defective, it seems to us that all the reasons apply why the court should refuse to confirm it on appeal, as would prevent it from making an order on it where there is none. The certificate must be supposed to contain the mind of the two viewing justices, who have framed it; if it omits to state any substantial matter, on which the statute requires them to express a judgment, the quarter sessions, whose whole jurisdiction depends on the certificate, cannot know that they have ever considered it, or, if they have, that in the order which they shall make they will be carrying out what it was intended to recommend.

We are of opinion therefore that the Quarter Sessions have in the present case exercised a lawful power, and exercised it properly; and that the rule ought to be discharged.

Rule discharged.

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The SOUTH EASTERN Railway Company, Appellants, *against* The Churchwardens and Overseers of the Poor of the Parish of DORKING, Respondents.

NOTICES having been given of appeal against two several rates for the relief of the poor of the parish of *Dorking*, a case was, by order of a Judge and consent, stated for the opinion of this Court. The material parts of the case were as follows.

The undertaking of the *R.* railway Company was, under an Act of Parliament, let to the *S. E.* Company at an agreed rent for 1000 years; and the *S. E.*

Company entered and occupied the line under the lease. By a subsequent Act, the two Companies were amalgamated; and, in lieu of the rent formerly paid to the *R.* Company, the shareholders became entitled to annuities, equivalent in amount to the rent, chargeable on the funds of the amalgamated Company, of which the *R.* line now became a branch.

Two rates were made by the overseers of the parish of *D.* on the *S. E.* Company as occupiers of a portion of the *R.* line which passed through that parish. One was made during the time that the *R.* line was the property of a separate Company, but occupied by the *S. E.* Company as tenants under the lease. The other was made after the amalgamation. Notice of appeal was given against each; and a case was stated for the opinion of this Court. The first question for the Court was, in substance, Whether the rent, during the period when the line was on lease, and the amount of the annuities paid for the line after the amalgamation, were the proper criterion of the rateable value of the branch line.

Held, by the whole Court, that they were not the criterion of the rateable value, which depended upon the present annual value of the property occupied, and might be more or less than the sum which the parties had agreed to give for it.

The case stated that traffic was brought by the *R.* line on the main line of the *S. E.* Company, and profit was thus obtained by the *S. E.* Company from the *R.* line, as a feeder to the main line of the Company: and it was found, as a fact, that, if the *R.* line was in the market, it would be an object of competition between the *S. E.* line and rival companies, and the rent would, in fact, be enhanced by such competition. The second and third questions for the Court were, in substance, Whether these matters should be taken into account in estimating the rateable value of the part of the *R.* line within the parish of *D.*, or whether the rateable value should be calculated solely on the profits of the line itself. On this:

Held, by Lord Campbell C. J., Coleridge J. and Crompton J., that both these matters were to be taken into account, inasmuch as, though lying out of the parish of *D.*, they enhanced the value of the occupation of the portion of the line in *D.*, and, though there might be much difficulty in calculating the result, the Sessions were to find it as nearly as they could.

Erle J. dissenting, and holding that the enhanced earnings on the parts of the line of the *S. E.* Company out of the parish of *D.* were to be rated in the parishes where these parts were situate, and not in the parish of *D.*, and that the only question was, what was the rent which would now be given for the occupation of the part of the line in *D.*

1854. *The South Eastern Railway Company* was established and incorporated under that name by stat. 6 & 7 W. 4. c. lxxv. (a).
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DORKING.** *The Reading, Guildford & Reigate Railway Company* were incorporated under that title by *The Reading, Guildford and Reigate Railway Act, 1846* (9 & 10 Vict. c. clxxi. (b)), and were thereby authorized to make a railway from *The Great Western Railway* at or near the *Reading* station of such railway in *Berkshire*, to join *The South Eastern Railway* in the parish of *Reigate* in *Surrey*. The same statute enacts that it shall be lawful for *The Reading, Guildford & Reigate Railway Company* to demise or lease *The Reading, Guildford & Reigate Railway* to *The South Eastern Railway Company* for such term, and upon such conditions, as shall be or shall have been agreed upon between the said Companies, and to carry into effect any arrangement, not inconsistent with any of the provisions thereinbefore contained, that shall be or shall have been agreed upon between the said Companies, subject to the provision next hereinafter contained, which is to the effect that *The Reading, Guildford & Reigate Company* should proceed with the construction of the entire line from *Reading* to *Reigate*, so that the same should be completed within the time limited by the Act, and that it should not be lawful for them to enter into any agreement with *The South Eastern Railway Company* for the abandonment of any portion thereof.
- “By articles of agreement, under the respective com-
- (a) Local and personal, public: “For making a railway from *The London and Croydon Railway* to *Dover*, to be called *The South Eastern Railway*.”
- (b) Local and personal, public: “For making a railway from *Reading* to *Guildford* and *Reigate*.”

mon seals of the said Companies, made 11th *May* 1847, it was agreed between the said Companies that *The Reading, Guildford & Reigate Railway Company* should grant to *The South Eastern Railway Company* a lease at a rent equal to 5*l.* 10*s.* per cent. per annum on the capital raised and to be raised by *The Reading, Guildford & Reigate Railway Company*, not exceeding 600,000*l.*, without any participation in profits by the said last mentioned Company; by way of commutation" for 4*l.* 10*s.* per cent., and half profits as previously agreed for; "and that the portion of the line between *Dorking* and *Reigate* should be included in the said lease; and also that, when *The Reading, Guildford & Reigate Railway Company* should have made the said *Reading, Guildford & Reigate* line, they should grant, and *The South Eastern Railway Company* should accept, a lease thereof for 1000 years on the terms in such agreement mentioned.

"The *Reading, Guildford & Reigate* line was completed, and opened for traffic throughout, from *Reigate* to *Reading*, before 15th *March* 1850, on which day a lease was granted by *The Reading, Guildford & Reigate Railway Company* to *The South Eastern Railway Company*, for the term of 1000 years, at the yearly rent of 33,000*l.* clear of all rates and charges except income tax. The lease also provided that *The South Eastern Railway Company* should pay interest, not exceeding 4*l.* per cent. per annum, on a bond debt of 200,000*l.* incurred in making the *Reading, Guildford & Reigate* line, which interest amounts to the sum of 8000*l.* a year. *The South Eastern Railway Company* are bound by the lease to keep the line in repair. When the lease was granted *The South Eastern Railway Company* were

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1854. bound by the agreement of 11th May 1847 to take the lease.”
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DORKING.** “*The Reading, Guildford & Reigate Railway* mentioned in the said lease forms a junction with *The South Eastern Railway* at *Redhill* in the parish of *Reigate* in the county of *Surrey*, and runs thence to *Reading* in the county of *Berks*; but it does not form a junction with *The Great Western Railway*.
- “*The Reading, Guildford & Reigate* line is worked by *The South Eastern Railway Company*, in connection with the main line from *London* to *Dover*, and the branches connected therewith; and *The South Eastern Railway Company* are the sole occupiers of the whole of the said lines, on which they carry on, exclusively, a business as carriers of passengers and goods.
- “There are 46 miles of railway between the junction at *Redhill* and *Reading*, but only 40 miles of this railway are demised by the lease; 6 miles of the line between *Guildford* and *Ash* belonging to *The South Western Company*, to the use of which *The South Eastern Railway Company* are entitled on payment of toll, pursuant to an agreement of *The Reading, Guildford & Reigate Company* and *The South Western Railway Company*.
- “*The Reading, Guildford and Reigate* line, leased to *The South Eastern Railway Company*, passed, for a length of 341 chains, through the parish of *Dorking* in the county of *Surrey*.
- “By a rate for the relief of the poor of the said parish of *Dorking* made on the 6th day of *December*, 1849, *The South Eastern Railway Company* were assessed, as occupiers of the portion of the said railway in *Dorking* parish, at a rateable value 2,228*l.* 2*s.* 6*d.*; and the rate

demand of *The South Eastern Railway Company* on that assessment amounts to 222*l.* 16*s.* 3*d.* For the purposes of this case, the said rate is to be taken as made after the date of the said lease, *The South Eastern Railway Company* not disputing that they were equally liable at the time of the making of the said rate, as if the said lease had been then made."

The case then shewed that notice of appeal against this rate was given by *The South Eastern Railway Company*, and proceeded :

"The respondents had in and by the hereinbefore mentioned rate assessed *The South Eastern Railway Company* in respect of the said portion of their railway in the parish of *Dorking*, upon a valuation founded upon the said rent of 41,000*l.*, paid by the said Company, under the said lease, for the *Reading, Guildford & Reigate* line : and, if the said rent is the proper criterion of the rateable value, then the said assessment of 222*l.* 16*s.* 3*d.* is correct.

"The gross earnings of *The South Eastern Railway Company* on the *Reading, Guildford & Reigate* line, less the proper deductions, did not, in the year for which the rate was made, amount to 41,000*l.*, less the statutory deductions under the parochial assessment Act. The *Reading, Guildford & Reigate* line brought a great deal of additional traffic to the main line of *The South Eastern Railway Company*: and the latter Company thus derived benefit from the *Reading, Guildford & Reigate* line, as a feeder to the main line, in respect of traffic conveyed upon that line. The *Reading, Guildford & Reigate* line, if in the market, might be an object of competition in consequence of the spirit of rivalry existing between *The South Eastern Railway Company* and other railway companies, the traffic on the main lines of which would

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1854. be increased by the possession and controul of the *Reading, Guildford & Reigate* line.
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- “ By ‘The *South Eastern and Reading, Guildford & Reigate* railways amalgamation Act, 1852’ (15 & 16 *Vict. c. ciii. (a)*), it was, in sect. 3, enacted that, ‘from and after the passing of this Act the *Reading* Company shall be dissolved, and subject to the powers and provisions of this Act, all the undertaking, estates, property, and effects whatsoever of that Company, already demised to *The South Eastern Company*, and all the capital, and all other the property and effects, and all the estates rights and interests, powers, authorities, and privileges, both at law and in equity, and otherwise howsoever, of the *Reading* Company, shall respectively remain and be transferred to and vested in *The South Eastern Company* absolutely and for ever, and shall be deemed part of the original undertaking of that company.’
- “ And, by sect. 27 of the same Act, ‘from and after the passing of this Act the whole of the undertaking of *The South Eastern Company* shall be charged with the payment to the shareholders in the *Reading* Company, their successors, executors, administrators, and assigns, of 40,000 perpetual annuities of 1*l.* 0*s.* 6*d.* each (making the aggregate perpetual annuity of 41,000*l.*) by way of commutation for the yearly rent and other yearly sums payable under the recited lease by *The South Eastern Company* to or for the benefit of the *Reading* Company.’
- “ By another rate for the relief of the poor of the said parish of *Dorking*, after the passing of the said last men-

(a) Local and personal, public: “ For merging the undertaking of *The Reading, Guildford, and Reigate Railway Company* in the undertaking of *The South Eastern Railway Company*; for the dissolution of *The Reading, Guildford, and Reigate Railway Company*, and for other purposes.”

tioned Act, on 12th November 1852, *The South Eastern Railway Company* are assessed as occupiers of the said railway in *Dorking* parish at a rateable value of 5040*l.* 10*s.*; and the rate claimed of *The South Eastern Railway Company* on that assessment amounts to 420*l.* 0*s.* 10*d.*"

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The South Eastern Railway Company duly appealed against the last mentioned rate.

"The whole of the facts and circumstances, previously stated as to the first mentioned rate, are applicable to the case of the last mentioned rate, with the exception of the lease, which is applicable only to the said first mentioned rate, and the said last mentioned Act of Parliament is applicable only to the last mentioned rate.

"The questions for the opinion of the Court are :

"First. Whether the appellants are properly assessed in the said rate of the 6th of *December* 1849 at the sum of 222*l.* 16*s.* 3*d.*, and in the said rate of the 12th of *November*, 1852, at the sum of 420*l.* 0*s.* 10*d.*

"Second. Whether the appellants are liable to be assessed in respect only of the net profit derived from the traffic passing through *Dorking*, irrespective of any rent paid by the Company and the value of the *Reading, Guildford & Reigate* line as increasing the traffic on the main line.

"Third. Whether the respondents are entitled to take into consideration, in their assessment, the value of the line to the appellants as an integral part of *The South Eastern Railway*, in addition to the net profit as derived from the traffic passing through the parish of *Dorking*.

"If the Court should be of opinion that the rent under the lease is the proper criterion of the rateable value as regards the first mentioned assessment, made during the

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“If the Court should be of a different opinion, then the matter is to go back to the Quarter Sessions, or an arbitrator to be appointed by counsel on both sides, to determine the proper amount of assessment in conformity with the opinion of the Court upon the 2d and 3d questions; and the rate is to be amended accordingly.

“If the Court should be of opinion that, as regards the last mentioned assessment, either the rent reserved under the said lease (notwithstanding such rent had ceased before the making of such last mentioned assessment) or the annuity payable under the said last mentioned Act of parliament is the proper criterion of the rateable value, then the same is to stand confirmed.

If the Court should be of a different opinion, then the same course is to be taken as with respect to the first rate.”

The case was argued in last *Trinity* term (a), by *Pashley* for the respondents, and *Willes* for the appellants. The arguments and authorities are so fully considered in the judgments as to render any further report unnecessary.

Cur. adv. vult.

In this Vacation (*February* 18th), there being a difference of opinion on the Bench, the Judges delivered separate judgments.

Crompton J. CROMPTON J. The first question is: Whether the two assessments in question are proper: and it is stated that

(a) *June* 8th, 1853.

they are to be regarded as proper, and are to be confirmed, if the rent as to the first rate, or the rent or annuity as to the second, is the proper criterion of the rateable value.

I understand by the question, as explained by this statement, that we are to say, Whether, in our judgment, these assessments were properly made by taking the rent, before the statute of amalgamation, or the rent or annuity, after that Act, as the sole criterion from which the assessment is to be made: and I am of opinion that it can by no means be so considered.

Even as to the first rate, where the smaller line has not become a portion of the other, the rent can only be taken as matter of evidence of the rateable value, or of the rent at which it might be expected to be let, under the Parochial Assessment Act; and all the circumstances under which that rent may at first have been given, or which may have subsequently affected the value of the portion of the line, must be taken into account, so as to see what would be the rent that might be expected to be got from it at the time when the assessment is made. Under neither of the rates can the rent or annuity be taken to be the sole criterion from which the assessable value can be arithmetically deduced.

I therefore answer the first question, as explained by the subsequent matter, by saying that, in my opinion, these assessments are not to be confirmed.

Secondly: I think that, in strictness, the value of the branch, as a feeder, is to be taken into account in ascertaining the rateable value. It is profit derived from the occupation of the land; and it seems to me impossible to say that the value to the persons willing to take the line, or the rent likely to be got from them,

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1854. would not be increased by the advantage of this line to, and from its being a feeder of, the larger railway. The value of the land in the parish is increased and enhanced by its being useful as increasing the profit that may be made in another place: and I think that the rateable value within the parish may clearly be enhanced by matters in another parish.

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It is true that in the mode of taking the account of the earnings in the parish and of the deductions to be made, according to the mode mentioned in the recent cases of *Regina v. Great Western Railway Company* (a), no item is mentioned for the value in respect of being a feeder to the main line: and it may be difficult, and often not worth while, to introduce this new element into the account: but, on principle, the rateable value, according to the rule in the Parochial Assessment Act, seems to me affected by the value of the line in the particular parish as a feeder of the main line. I answer the second question, therefore, in the negative.

And, as I suppose that the third question refers to the value of the branch line as a feeder, no other peculiar value than as a feeder being suggested, the third question seems in effect another way of putting the second; and I answer it in the affirmative: that the respondents are entitled, in making their assessment, to take into consideration the value as a feeder to the main line.

Erle J. **ERLE J.** In this case I consider the material facts to be, that one rate was made while *The Reading and Reigate Railway* was under lease, and the other after it was amalgamated with *The South Eastern Railway*: and the material questions to be: What is the principle for

(a) 15 Q. B. 379, 1085.

ascertaining the rateable value of the portion of the line in the parish of *Dorking* for each rate; the parish contending that the rent of 41,000*L.*, paid at the time of the first rate, and the annuity of 41,000*L.*, paid since the amalgamation, should be taken as the rateable value of the whole line to be apportioned among the different parishes; the railway contending that the net earnings of the portion of the line in the parish should be taken as the rateable value. As the rate since the amalgamation is the most important, being the guide for future rates, I take that first.

By the amalgamation the *Reading and Reigate* line, which was a feeder, has become part of the *South Eastern* line, as much as if it formed part of the original construction; so that, now, either all is line or all is feeder: the amalgamation in this case being in no respect distinguishable from the amalgamation of the *Newbery and Hungerford* line with the *Great Western* in *Regina v. Great Western Railway Company (a)*. There, the principle for rating a railway, by taking the net profit of the whole line as the rateable value of the whole, and by apportioning that rateable value among the parishes in proportion to the net earnings in each parish, was sanctioned and acted on. This principle was decided to be correct, after long consideration, in *Regina v. London, Brighton and South Coast Railway Company (b)*, *Regina v. South Eastern Railway Company (c)* and *Regina v. Midland Railway Company (d)*; and I extract the principle as expressed in each of those cases. In *Regina v. London, Brighton and South Coast Railway Company (b)* the parish of *Croydon* claimed a right to rate the railway on the principle of parochial

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(a) 15 Q. B. 379, 1085.

(b) 15 Q. B. 313, 358.

(c) 15 Q. B. 344, 358.

(d) 15 Q. B. 353.

1854. earnings, that is, at such a sum as a solvent tenant would pay as annual rent for the stations and portion of the railway within the parish regard being had to the net revenue earned in the parish; and this principle was affirmed by the Court. In *Regina v. South Eastern Railway Company* (a) the parish of *Westbere* claimed to rate the Company for a portion of the branch to *Rams-gate* on the mileage principle of dividing the rateable value of the trunk and branches according to the distance in each parish. It was found that the traffic upon the main or trunk line was greater than upon any of the branches. The Company contended for the principle of parochial earnings, viz.: that they ought to be rated at such sum as a tenant might be expected to give as annual rent for that portion of the branch railway situate within the parish of *Westbere*, regard being had to the portion of profit earned by the portion of the railway within that parish, such rent being ascertained by taking the gross annual receipts from the portion of the railway situate in *Westbere*, such gross receipts being ascertained by taking a proportion of the fare paid by every passenger who has during the year been carried by the Company over any portion of the line in *Westbere*, such proportion bearing the same ratio to the whole sum paid by such passenger for the whole distance travelled by him as the distance in *Westbere* bears to the whole distance travelled by him; and calculating goods on the same principle; and taking from such earnings the deductions allowed by the parochial assessment Act: Held: that this principle of estimating the gross profits was correct, and that deductions were to be on the parochial principle also. It is said, in arguing (b): "Here there is

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(a) 15 Q. B. 344, 358.

(b) In the report in 20 L. J. N. S. M. C. p. 140.

a parish including a portion of a branch line upon which it is found that the profits fall far short of those earned on the main line. The profits on which the rate is to be calculated are those arising within the rating parish." "The respondent parish has no right to any of the profits earned on the main line." The judgment of the Court supports this argument. In *Regina v. Midland Railway Company* (a) the parish of *Basford* rated on the mileage principle; the Company contended that the rate ought to be estimated by reference solely to the net profits earned by the railway within that parish, without any reference to the net profits earned elsewhere, or to the rateable value of any portion of the railway lying in any other parish; the judgment affirms this principle. In *Regina v. Great Western Railway Company* (b) the question was how the *expences* of a railway were to be apportioned; and it was held that they also, where they are local, are to be apportioned to the parish where they arise, and deducted from the gross earnings in that parish, calculated on the principle laid down in the foregoing cases. Nothing more than the gross earnings in the parish were allowed to the parish, although it was found that it was profitable to the Company as proprietors of the entire *Great Western Railway*, by reason of the increased traffic brought thereby upon the main line, and the increased receipts upon that line between *London* and the western termini of it. As each parish is held entitled to rate for the earnings therein, as, for example, *Croydon* for all that is earned therein, it is clear that none of the other parishes on the line can rate for the tendency of the line situate in them to make the earnings in *Croydon*; the earning is profit; and, if the whole profit in *Croydon* is rated there, and the tendency to

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(a) 15 Q. B. 353.

(b) 15 Q. B. 379, 1085.

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create that profit is rated elsewhere, the same profit would be, in effect, rated twice, which is unlawful. Also it is clear that no tendency to create profit is rateable; no tenant would pay rent for a tendency to profit, unless it resulted in profit; and certainly no tenant of the part of the line in *Dorking* would pay rent to increase the profit of some other tenant of some other part of the line. As was mentioned in *Newmarket Railway Company v. St. Andrew's the Less, Cambridge* (a), in this Term, the annuity paid for the purchase of the line is no evidence of the rateable value where the profit is ascertained: it may afford a distant presumption when the profit is unknown: but, as a general rule, the cost of the production, or the price paid for the purchase, whether it be a sum or an annuity, is immaterial to shew the rateable value: the question is, what rent would a tenant pay for it from year to year when the rate is made; and, in considering that, the tenant would disregard the cost price. It is also clear that the profit, during the year in which the rate is made, is the material fact for the guidance of the parish in making the rate; and they must use the latest information and adapt the rate thereto.

In *Regina v. London, Brighton & South Coast Railway Company* (b) the rate was made in *November*, based on a calculation of profit founded on the half yearly return down to the preceding *June*; and, in the interval between *June* and *November*, the Company had expended 100,000*l.* on their plant, and claimed an allowance for that expence; and it was held they were entitled to it; the Court saying (c) that "the overseers, in making a prospective rate, are to make it on the supposed pro-

(a) *Ante*, p. 94.

(b) 15 Q. B. 313, 358.

(c) 15 Q. B. 367, 368.

spective value ascertained by them, as well as they can, from the latest evidence in their power as to antecedent value."

With respect to the first rate, made during the lease at 41,000*l.* per annum, it is clear that the rent which is paid at the time of the rate is presumptive evidence of the rent at which it would let at that time; and it is also clear that, whatever may be the profit from the tenement, if, by reason of competition or otherwise, a higher rent could be obtained than the profit would warrant, it is to be rated at the rent which could be obtained. But the presumption from the amount paid may be rebutted. Thus, if an open coal mine be let at a rent, and it be proved that the mine has become exhausted, it is not to be rated at the rent agreed for while it was productive; and so, if an unopened coal mine was let at a rent, agreed for on the speculation that it would prove productive, if nothing was obtained, the rent would be no evidence of rateable value. Here the rent was agreed on before the railway was tried, upon a speculation of profit both immediate on the line and mediate through feeding the trunk line; and, if this speculation turned out a failure, the rent agreed for on that ground would be no proof of rateable value, and the presumption from the rent would be rebutted. But, with respect to the first rate, it is found that the line, at the time, was an object of competition to several lines, who would be willing to pay more than the profit would warrant; the rateable value therefore would be the rent which it would let for under this competition; and that rent would be the rateable value of the whole line, and would be to be apportioned among the parishes on the line in proportion to the length therein. My answer to the first question, there-

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fore, is : That, with respect to the first rate, a reference should be made to ascertain what rent could have been obtained for the line at the time of the rate ; and, with respect to the second rate, that a reference should be made to ascertain the rateable value upon the principle above described. And I have thus disposed of all that was material in the questions submitted.

But, as the Judges differ on the questions, Whether a railway can be rated for more than it produces in the parish, on account of its tendency to make profit elsewhere, which is expressed by a metaphor from feeding, and on the question, Whether, in a case for apportionment, one parish in making its rate can disregard the portion of other parishes within the apportionment, and as a generality cannot be tested without a specific application, I suggest, if a case is again brought up relating to these points, it should state specifically what is the railway profit arising out of the parish which is liable to be rated within it.

Coleridge J.

COLERIDGE J. This case raises two questions upon two separate rates ; the facts, existing when these rates were respectively made, slightly differ ; and in considering the points to be decided on each I will notice the difference. The defendants were an existing Company with a line formed from *London to Dover*, when *The Reading Guildford and Reigate Company* was incorporated, by Act of Parliament, for the purpose of forming a line from *The Great Western Railway* to the defendants' line ; and the Act authorized the new Company to lease their line to the defendants. Before the line was completed, the two Companies appear to have negotiated as to the terms of the lease. First, it seems that the defendants

had agreed to give 4*l.* 10*s.* per cent. on a capital not to exceed 600,000*l.*, and half the profits of the line ; then it was arranged to commute this for 5*l.* 10*s.* rent, without any share in the profits ; ultimately, on the completion of the line, the negotiations terminated in a lease for 1000 years, at a rent of 33,000*l.*, clear of all rates and charges except income tax ; and the lease also provided that the defendants should take on themselves the payment of 4*l.* per cent. interest on a bond debt of 200,000*l.*, incurred in making the line, amounting to 8000*l.*, so that the defendants were substantially to pay 41,000*l.* a year for the occupation of the new line. The defendants took possession under this lease, and worked the line in connection with their main line and branches : they are the sole occupiers of all these lines, and carry on exclusively thereon the business of carriers of passengers and goods. For the distance of 341 chains, the leased line passes through the parish of *Dorking* ; the parish officers of which, founding their assessment of the rateable value of these 341 chains upon the said sum of 41,000*l.*, which they treat as the rent of the whole line, have found it to be 2,228*l.* 2*s.* 6*d.*, and demanded a rate of 222*l.* 16*s.* 3*d.* : and, if the said rent is “the proper criterion of the rateable value,” it is agreed that the assessment is correct.

I have had much doubt as to the meaning of the Sessions in the use of this language. If they mean that the correctness of the assessment is to depend simply on the amount of the rent, the rent being taken as the one fact, exclusive and conclusive, by which, as a mere matter of arithmetical calculation, the rateable value is to be measured, then I should think the parish officers clearly wrong, and that the assessment could not be confirmed.

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1854. The rent agreed for and paid may be always taken as evidence, more or less strong according to circumstances, of that supposed rent from which, by the statute, the rateable value is to be arrived at; and, being evidence on one side, if there be nothing to set against it, it may be of course conclusive. Still it is only evidence; and, where there are any other circumstances in the case to influence the inquiry, it never can be looked to solely and conclusively. Upon the best consideration I can give the case, and (as I have said) after much doubt, I have come to the conclusion that the parish officers have relied on it as the one governing test; and therefore I think the rate was made on a wrong principle, and cannot be affirmed.

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The second rate now brought before us is made under these circumstances. By an Act of Parliament, passed in 1852, the defendants' undertaking and that of *The Reading, Guildford & Reigate Railway Company* were amalgamated: the lease came to an end: and the latter Company was thenceforth, absolutely and for ever, to be deemed part of the original undertaking of the former Company. By the same Act, the defendants were to pay to the shareholders of the *Reading* line 40,000 perpetual annuities of 1*l.* 0*s.* 6*d.* each, making altogether 41,000*l.*, "by way of commutation for the yearly rent and other yearly sums payable under the recited lease." In making the rate for 1852, after the passing of this Act, the parish officers have taken the value of the 341 chains at 5040*l.* 10*s.*, and assessed the defendants at 420*l.* 0*s.* 10*d.* Though it is not expressly stated, yet I infer, from the question proposed for our opinion, that they have done this on the ground that the value is increased simply by their now forming, not part of an independent line

demised to the defendants, but an integral part of the main line. I come to this conclusion, because no other change of circumstance is stated in the data for ascertaining the rateable value in the two assessments: and, as far as I understand the facts, they raise a very strong presumption against any increase in the rateable value being consequent upon this change. The annuities seem to me merely substituted for the rent as another denomination of the same amount. I do not say that the occupation in *Dorking* might not be more valuable by reason of the amalgamation; but there is no evidence stated to shew that it is so; and the presumption is against it from the equality of the rent and annuities. This rate then only adds, to the faulty principle on which the first has been made, another, and therefore I think cannot be affirmed. I answer, therefore, the first question as to both rates in the negative.

I understand the second and third questions to be intended to raise three points. First: Must the assessment be made only on the net profits earned by the passage of goods and passengers over the land occupied in *Dorking*, and must any additional value which the occupation in truth may have as increasing the traffic on the main line, be excluded? Secondly: May any additional value, which the occupation of the land in *Dorking* may have by reason of the amalgamation of the two lines, be included in the assessment? The two questions, I presume, were framed with a view to the different circumstances under which the two rates were made, in respect of the amalgamation. My answer to these questions will be this. Nothing is to be excluded which, I do not say has a tendency to add to (for of this no notice can be taken), but, which actually adds

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to, the value of the occupation; for the rate is to be regulated in amount by that value; and it is a principle, which I believe to be established by numerous decisions, that the inquiry is not so much *where* the profits of the occupation are produced, as whether any alleged profits are so directly referable to it as properly to be considered parts of the profit of the occupation, or, to adopt the words of Mr. *Cripps* in his sensible essay on the subject, "the rateable value within the parish may depend on matters without the parish" (a). I am not aware that this conflicts with any decision. This principle was first laid down and acted upon in regard to railways in *Regina v. The London and South Western Railway Company* (b); and, as regards them, that case has been a governing authority ever since, from which I should be very sorry to depart. As I understand the two *Tilehurst* cases (c), nothing was decided in either that at all breaks in upon it; and I certainly intend to adhere to both of those decisions. The principle indeed was well established as early as the *New River Case* (d); and I have long considered it as well settled that we are to apply the same principles to the rating the occupiers of railways as of any other property, though the application may be in some respects much more difficult, and the results not always so certainly attained. I by no means say that either the increase of the traffic on the main line, or the amalgamation of the two lines, has actually the effect of increasing the value of the occupation of the land in *Dorking*: that is purely a question of fact with which we have nothing to do.

(a) *How to rate a Railway*, p. 3.

(b) 1 Q. B. 558.

(c) *Regina v. The Great Western Railway Company*, 6 Q. B. 179;
Regina v. Great Western Railway Company, 15 Q. B. 379, 1085.

(d) *Rea v. The New River Company*, 1 M. & S. 503.

And, if in fact, from either cause, such increase takes place, I am not prepared to point out to the parish officers how it is to be ascertained, or measured, or how it is to be distinguished from the general profits of the occupation in the parishes on the main line: that again is not within the province of the Court. It may well be that such increase may exist, and yet it may be so unimportant, or so difficult to ascertain, that, as mathematical accuracy in a rate is never to be expected, it may be more prudent on the whole for the parish officers not to press it into the valuation. But, subject to the effect of these remarks, which I make the more distinctly because I consider it of great importance for this Court always to abstain from expressing opinions on mere matters of fact, and to confine itself to laying down principles in questions of rating, my answer to the second question is this: That the assessment may, and indeed should, be made with respect had both to the rent and to any increased value which the occupation in *Dorking* may have by increasing the traffic on the main line. And I give the same answer in effect to the third question: that the respondents may and ought to take into consideration the value of the occupation as an integral part of the main line; in both cases, as I have already stated, *if* they can ascertain that the value is increased thereby, and *in proportion* as they find it increased thereby. It will be observed that in both cases I slightly alter the wording of the questions to what I understand to be the meaning they were intended to convey.

It has been objected that these principles, when applied to railways, may lead to double rating, because the same proprietor may be assessed in respect of the

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same profits in two parishes. I do not understand how the principle of rating can differ where there is one and the same occupier in two parishes from where there are two or more occupiers. If the occupier be the same, the properties are necessarily different in respect of which he is rated; and for this purpose he must be considered as a distinct person in each parish in which he occupies. In each the overseers will rate him in respect of the property in their parish; and they will estimate its value by what it produces, not merely there, but any where; if the profits of some other land in his occupation in another parish are mixed up with what the land in their parish produces, that ought to be the ground of a deduction from the assessment; and, if not made, the rate may be excessive in amount. It may be impossible to do this with mathematical accuracy; but to do it is the business of the parish officers in the first instance, of the Sessions in the second, but never of this Court.

If in the case of the *New River* the parish officers of *Islington* should assess the Company, looking only at the total profits received in their parish, and making no separation of, or allowance for, that share which was properly referable to *Amwell* and rateable there, they would over-rate, and an appeal would lie: but this would be no ground for diminishing the rate in *Amwell*; for the excess in *Islington* ought to have been appealed against. If it has been, we must presume redress has been afforded; if it has not, the Company has acquiesced; either way the parish officers of *Amwell* cannot be affected by the course pursued by those of *Islington*. How can that case be distinguished from this? The land and the water have a rateable value in *Amwell*, considered merely as such;

but it is small; they contribute, however, with other land and water elsewhere, to produce great profits, which are reaped, as it were, in *Islington*; and they are rated for the amount of this contribution. In *Islington* there is also land and water; and there the great mass of the profits is ostensibly produced: but the overseers there ought to separate, from the portion on which they are to rate, the portions which are really earned by the land and water in *Amwell* and the other parishes intervening. So, here, the land in *Dorking* has per se a rateable value; but it is said to contribute to produce, with other land in other parishes, great profits at the *London* terminus of the main line; and the occupier in *Dorking* has the contribution included in the rate on his land in *Dorking*; which therefore ought not to contribute to the rate in any other parish. Could the exact amount of that contribution be ascertained easily, not a doubt could exist that such rating was on a fair principle: but the difficulty of ascertaining the amount, surely, can make no difference in the principle. To clear up that difficulty, whatever it may amount to, is not the province of this Court, but of an accountant.

Under the circumstances, therefore, it will be necessary in my opinion to send both rates to an arbitrator, to ascertain the proper amount according to the principles I have laid down.

Lord CAMPBELL C. J. It seems to be most convenient to begin with the second question submitted to us in this case. And I am of opinion that the liability of the appellants, to be assessed to the relief of the poor in the parish of *Dorking* in respect of the portion of the *Reading* line in that parish, cannot be confined to the net profit derived

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1854. by the appellant from the traffic passing through that parish. They are only to be assessed in that parish in respect of property occupied by them in that parish; but its value in the parish may be enhanced by circumstances existing out of the parish. The appellants say truly that they are not to be rated in this parish for profits made elsewhere: I wish implicitly to abide by what is called "the parochial principle" of rating. But, upon that principle, we must see of what value the property rated in the parish is to the occupiers; and this is not necessarily determined by the pecuniary receipts for the use of it within the parish. The rent that was paid by the appellants is strong evidence that it was of greater value to them than the mere net profit from traffic upon it. We have an express admission that the *Reading* line brings "a great deal of additional traffic to the main line," and that they derive benefit from the *Reading* line "as a feeder to the main line, in respect of traffic conveyed upon that line;" and that the *Reading* line, "if in the market, might be an object of competition between *The South Eastern Railway Company* and other railway companies, the traffic on the main lines of which would be increased by the possession and controul of the *Reading, Guildford & Reigate* line." Therefore, *plus* the net profit derived from the traffic passing through the parish of *Dorking*, the appellants do derive a profit from the occupation of the portion of the line in that parish. But it is said that in respect of this last profit they ought only to be assessed in the parishes through which the main line passes. I am of a contrary opinion. This profit, although not received for the traffic upon the line in the parish of *Dorking*, originates from the occupation by the appellants of land in the

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parish of *Dorking*; and, if they are assessed in that parish in respect of this profit, in estimating their profits in the parishes through which the main line passes there ought to be a deduction in respect of what is paid for the line which is worked as a feeder to the main line. This calculation, though difficult, may be made upon data which are accessible, and is not more difficult than calculations, which must be made in railway rating, where stations and inclined planes in one parish affect the traffic in another parish. Adhering to the parochial principle, I inquire of what value the land rated is to the occupier. Of this value the rent he is willing to pay for the land affords evidence; and, from any profit which he indirectly makes from it out of the parish, part of the rent which he pays for it in the parish is to be regarded as a deduction. At the bar it was hardly denied that this would be the result if the two railways belonged to different companies, and if the company whose railway is fed were to pay a regular fixed annual sum to the company whose railway is the feeder. But I do not see how it should make any difference to the parish of *Dorking* that both lines are occupied by one company and are worked as one concern. The advantage derived from the occupation of the portion of the line in that parish is still the same, although the process by which the amount of that advantage is to be calculated is changed. I adhere to the rule of rating which I had laid down in *The Newmarket Railway Company v. St. Andrews the Less, Cambridge* (a), and which I there attempted to support and illustrate. This I think is in entire harmony with our decision in *Regina v. Great Western Railway Company* (b). In many cases the sup-

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(a) Ante, p. 94.

(b) 15 Q. B. 379, 1085.

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posed advantage derived by a railway company from a portion of a railway in a particular parish bringing passengers and goods to another portion out of the parish may be almost inappreciable; and I would earnestly dissuade parishes from ever making any claim under this head, unless where upon clear evidence the claim can in point of fact be established.

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In answer to the third question, I say that the respondents are not entitled to treat the *Reading* line as an integral part of *The South Eastern Railway* so as to depart from the *parochial* principle; but they are entitled to consider in the assessment the value of the *Reading* line to the appellants beyond the traffic passing through the parish of *Dorking*.

In answer to the first question, I cannot say that the rent under the lease or the annuity payable under the last Act of parliament is necessarily the criterion of the assessable value.

And therefore, according to the arrangement agreed upon between the parties if this should be our opinion, the matter must go back to the Quarter Sessions, or to an arbitrator, to determine the proper amount of assessment in conformity with the opinion pronounced by a majority of the Court upon the second and third questions.

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THOMAS WILLIAM READ *against* The Local Board
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THE *Local Board of Health of Norwich* having made a general district rate, *John Elmer*, who was assessed to it as occupier of premises situated in the parish of *St. Mary in the Marsh*, gave notice of appeal to the Quarter Sessions, and *Thomas William Read*, who was assessed to the same rate, as occupier of premises in that part of *Norwich* called *The Hamlets*, also gave notice of appeal to the Quarter Sessions. Two separate cases were stated, under stat. 12 & 13 *Vict. c. 45. s. 11.*, which were nearly similar.

The case in *Elmer v. The Local Board of Health of Norwich* stated that the city and county of *Norwich* anciently consisted of thirty six parishes within the walls, which were called the city; and of six hamlets without the walls, which were in the county of the city: and that stat. 46 *G. 3. c. lxxvii. (a)* only extended to the parishes in the city; and that stat. 6 *G. 4. c. lxxviii. (b)* partially repealed the former Act. It then proceeded. "The parish of *St. Mary in the Marsh* is within and constitutes the precincts of the cathedral church of *Norwich*, and adjoins the city, and is within the outer boundary of the

Where the Public Health Act, 1848, (11 & 12 *Vict. c. 63.*) is applied to a district comprising several parishes, the expences of repairing and maintaining the highways, within the district, are to be met by a district rate to be levied by the Local Board of Health under that Act, and not by highway rates, though The Local Board of Health is, by sect. 117, to act as surveyors of highways within the district.

(a) Local and personal, public: "For better paving, lighting, cleansing, watching, and otherwise improving, the City of *Norwich*."

(b) Local and personal, public: "For amending and enlarging an Act' &c. (46 *G. 3. c. lxxvii.*)

1854. county of the city of *Norwich*, but until the passing of the Municipal Act was not within its corporate jurisdiction, but had its own justices, repairing its own highways, and maintaining its own poor. The Parliamentary boundary of the city and county of the city of *Norwich* were by stat. 2 & 3 *W. 4. c. 64. (a)* declared to be 'the city and county of the city of *Norwich*, together with all such extraparochial places as are contained within the outer boundary of the city and county of the city of *Norwich*;' and which boundary was declared by stat. 5 & 6 *W. 4. c. 76. s. 7. (b)* to be the municipal boundary of the city and borough of *Norwich*, for the purposes of that Act.

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"By a provisional order of the General Board of Health dated the 4th day of *June*, 1851 (confirmed by stat. 14 & 15 *Vict. c. 98.*), after referring to stat. 46 *G. 3. c. lxxvii.* and stat. 6 *G. 4. c. lxxviii.*, it was ordered and directed, subject to the confirmation of the order by Act of Parliament:" the case then set out the directions in the order, which were (in substance): 1st. That The Public Health Act, 1848, and every part thereof except sect. 50, should apply to, and be in force, within and throughout the entire area comprised within the boundaries of the said city of *Norwich* and county of the said city, as the same were fixed for the purposes of stat. 2 & 3 *W. 4. c. 64.*; and that the said city and places, and parts of places, should be one district for the purposes of The Public Health Act, 1848. 2d. That the Mayor, aldermen and citizens of the said city should be, by the council of the said city, within and for the said district constituted as aforesaid, The Local Board of Health under that Act. 3d. That such parts of the said local Acts as were specified in a schedule thereunto annexed should be repealed, except in so far as the same repealed any

(a) Schedule (N. 2.), 24.

(b) Schedule (A.), sect. 1.

other Act or Acts of Parliament. 4th. That all the powers, &c., of the commissioners for putting the said local Acts into execution should wholly cease and determine, and those of their treasurers and other officers should wholly cease and determine, from such time as shall be notified to them respectively by the said Local Board of Health. 5th. That such of the said powers, &c., as are granted by so much of those Acts as should not be repealed, according to the provisions of that order, and so far as the same are not repugnant to or inconsistent with the said Public Health Act or that order, or any by-law which shall be lawfully made under the said Public Health Act, should be transferred to The Local Board of Health, and should be exercised in the same manner, as nearly as may be, as if such powers had been granted by the said Public Health Act. 6th. That the said Local Board should be the commissioners for executing such parts of the said local Acts as should not be repealed according to the provisions of this order. 7th. That all lands, &c., and all other property and estate whatsoever belonging to or vested in the commissioners acting in the execution of the said local Acts, should be transferred to The Local Board of Health, and should, as near as circumstances would permit, be held by the said Local Board of Health upon the same trusts, &c., as the same were held by such commissioners. 8th. That all bonds, debts, &c., contracted or payable by such commissioners, should be paid and satisfied by the said Local Board out of such parts of the said transferred property and estate as would or ought to have been charged or chargeable in respect of the same if that order had not been made, and should, as near as circumstances would permit, have the same priority, and be paid and satisfied within the

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1854. same time, and be recovered from the said Local Board as the same might have been recovered from such Commissioners.
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- “ 9th. Provided always that if such property and estate be insufficient for that purpose, the deficiency shall be charged upon and paid and satisfied by the said Local Board of Health out of the general district rates levied under the said Public Health Act in the parts and places, which would or ought to have been chargeable with such deficiency, if this order had not been made, or out of any funds in the hands of the said Local Board available for the purposes of the said Public Health Act, under the powers of any local Act not repealed by this order, and the Act of Parliament confirming the same.
- 10th. Provided also, that if such property and estate be more than sufficient, the surplus shall be applied to the exclusive use and benefit of the parts and places, and as nearly as may be to the same purposes, to which the same would or ought to have been applied if this order had not been made.
- 11th. That all charges and expences which shall be incurred by the said Local Board of Health, under such parts of the said local Acts, as shall not be repealed according to the provisions of this order, and which shall not be defrayed out of the tolls,” &c. “received by the said Local Board under such local Acts, shall be deemed to be expences incurred by such Board under the said Public Health Act and shall be defrayed out of the general or special district rates (as the nature of the case may require), or out of any such funds as aforesaid, and the moneys necessary to be raised for the purposes of such local Acts may be borrowed, charged, secured and recovered in the same manner as if such charges and expences were actually incurred under the said Public Health Act.”

The 12th and 13th directions provided for the saving of existing rates &c.; and for the enforcement of penalties already incurred.

The clauses of the local Acts which were repealed are:

In stat. 46 *G. 3. c. lxvii.*: the sections numbered from 1 to 21 both inclusive; sect. 25, sect. 26; sects. 28 to 32 both inclusive; sect. 40; sects. 42 to 45 both inclusive; sects. 49, 50, 51, and sects. 57 to 84 both inclusive. And in stat. 6 *G. 4. c. lxxviii.*: sects. from 2 to 8 both inclusive; and from 14 to 25 both inclusive.

“At the time of the passing of the Act confirming the order of the General Board of Health, the commissioners appointed under the local Act had no money, lands, buildings or property belonging to them, except only some utensils and materials for paving the streets.

“Amongst the unrepealed clauses of the said local Act (46 *G. 3. c. lxvii.*) is the 22d, which vests all the pavements in the several markets, streets, lanes and other public passages and places within the said city in the said commissioners; the 27th, which empowers the commissioners to new pave, repair and drain the said markets, streets, public passages and places; the 52d, which empowers the commissioners to purchase any lands, tenements and hereditaments, which they shall judge necessary and proper to be purchased, for the improving and widening of any of the said markets, streets, lanes, public passages or places; the 53d, which enables all bodies politic and persons, whether under disability or not, to sell and convey such lands, tenements and hereditaments to the said commissioners and their successors, for the purposes of that Act; and the 54th, 55th and 56th clauses, which provide for cases of refusal or inability to sell, for

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1854. the ascertaining the amount to be paid in such cases, and for the payment of costs. Amongst the unrepealed clauses of the local Act 6 G. 4. c. lxxviii. is the 1st, which extends all the powers of the said former local Act to that Act; and the 13th, which empowers the commissioners to rate the several landlords and owners, and the several tenants and occupiers, of all houses, buildings, lands, grounds and other hereditaments within the said city of *Norwich* which were or should be rated to the relief of the poor of the said city and county of the same, in any sum not exceeding 5s. in the pound, by the year, to be computed on half of the annual rent or value thereof respectively. The Local Board of Health, being about to make a rate for payment of their expenditure, caused an estimate to be prepared (under sect. 98 of The Public Health Act, 1848) of the money required for the purposes in respect of which the rate was to be made, shewing the several sums required for each of such purposes; "a printed copy of which estimate was annexed to the case.

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"Some of the items in such estimate are for interest upon the money borrowed by the late paving commissioners, as aforesaid, and still due; another item is for the purchase money for ground purchased by the said late paving commissioners or by The Local Board of Health, under the unrepealed provisions of the said local Acts, for the improvement and widening of a street called *London Street* in the parish of *St. Andrew* within the said city. Other items are for the expences of paving, repairing, lighting and cleansing the several markets, streets, lanes, public passages and places within the city of *Norwich*. Other items are for the like expences with respect to the streets and roads in the

hamlets. And other items are for expences incurred in respect of the streets within the city and in respect of the roads in the hamlets, without distinguishing the one from the other."

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The case then set out the notices of appeal on behalf of *Elmer*, who was assessed to the rate; and concluded:

"The questions for the opinion of the Court are to be:

"1st. If the said parish of *St. Mary in the Marsh* be within the jurisdiction of The Local Board of Health constituted by the said order.

"2nd. If so, Whether the inhabitants are liable to the debt contracted by the late commissioners.

"3rd. If the streets and ways within the parishes in the city are to be repaired under the provisions of the 46 G. 3., separate from the said parish of *St. Mary in the Marsh*.

"4th. If the unrepealed clauses in the local Acts extend to the said parish of *St. Mary in the Marsh*, and to the area added by The Board of Health, or are to be confined solely to the city parishes.

"5. Whether the roads and highways of the said parish of *St. Mary in the Marsh* are to be repaired by The Local Board, and the charges to be levied by a separate rate under the powers of surveyors of the highways.

"6. Whether the expence of widening the streets in the city parishes and for purchase of buildings for that purpose are to be defrayed by a rate made upon those parishes, or by a rate made upon the whole district including the parish of *St. Mary in the Marsh*.

"The Court to have the same powers of amending or quashing the rate as are given to Courts of Quarter Sessions by the general Act (a), sect. 136."

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The Case in *Read v. The Local Board of Health of Norwich* was the same in substance; but the questions submitted to the Court were four only, corresponding with the second, third, fourth and sixth questions above stated, but making them apply to the hamlets, instead of to the parish of *St. Mary in the Marsh*.

Elmer v. The Local Board of Health of Norwich was argued in last term (*January 21*), by *Bramwell* for the appellant, and *Sir A. J. E. Cockburn*, Attorney General, for the respondents (*a*): and *Read v. The Local Board of Health of Norwich* was argued, on the same day, by *Hugh Hill* for the appellant, and *Sir A. J. E. Cockburn*, Attorney General, for the respondents (*b*).

The arguments are omitted, as those relating to the construction of the special Acts are not of general interest, and those relating to the construction of The Public Health Act, 1848, sufficiently appear by the judgment.

Cur. adv. vult.

COLERIDGE J., in this Vacation (*February 18th*), delivered judgment.

With respect to the first question in the case, it was conceded, on the part of the plaintiff, that the parish in question was within the local jurisdiction of The Local Board of Health.

As to the second question, it was conceded, by The Board, that the inhabitants of the parish were not liable to the debts contracted by the late commissioners under the local Act.

The third question was, Whether the streets and ways

(*a*) Before *Coleridge* and *Crompton Js.*

(*b*) Before Lord *Campbell C. J.*, *Coleridge* and *Crompton Js.*

within the parishes in the city are to be repaired under the provisions of stat. 46 *Geo. 3. c. lxxvii.*, separate from the parish of *St. Mary in the Marsh*.

We understand this question to mean, as indeed it was agreed on both sides to do, whether the money for the repair of the streets and ways within the parishes was still to be raised by a rate under the provisions of the local Act made in those parishes separately from the parish of *St. Mary*. We expressed a strong opinion on this part of the case during the argument; and we continue to think that the rating powers under the local Act are sufficiently repealed by the order, confirmed by Act of Parliament, notwithstanding the argument which was relied on as arising from the fact of the first, twelfth and thirteenth clauses of the second local Act not being repealed. The first section of the local Act 6 *G. 4. c. lxxviii.* extends to that Act all powers, remedies and provisions contained in stat. 46 *G. 3. c. lxxvii.*, the first local Act; and the 12th section repeals the part of the former Act regulating the assessments according to the assessments for the relief of the poor; while the 13th section requires the commissioners to assess the owners, &c., in a sum not exceeding 5s. in the pound in the year to be computed on half the annual rent or value. It was contended that, as the order left unrepealed those clauses in the latter Act, the power of raising rates under these Acts must be taken to continue and to be now vested in the Board of Health; and that the assessments for paving and repairing the streets must be made by the Board under those Acts. As, however, the power of rating originally conferred by the first Act, which is the foundation of the powers in the later Act, is expressly repealed by the order, and as the provisions for the machinery by which these rates

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were to be collected are also repealed, we think that the whole power of rating under these Acts is gone, and that the money for repairing the streets in the parishes in question cannot be raised under the provisions of the local Acts.

With regard to the fourth question, it is quite clear, and was most properly conceded on the argument by the Attorney General, that there is nothing to extend the unrepealed clauses which affected the city parishes only to any other parish not included within the district to which the local Acts in question are confined.

The fifth question, one of general importance, is: Whether, where Local Boards of Health are established, they are to raise funds for the repair of the highways by district rates under The Public Health Act, 1848, or by highway rates levied by them as surveyors under the Highway Act. As the mode and proportions of rating under these two Acts differ materially, it has become a question, and certainly is one of considerable difficulty, whether or no the Board are to make a district rate for the purpose of such repairs, or are to act as surveyors and lay a rate under the Highway Act.

By the 68th section of The Public Health Act, 1848, all streets (which, by the interpretation clause (a), include all highways, not being turnpike) within the district are vested in, and are to be levelled, paved, altered and repaired by, The Local Board of Health. By the 87th section the treasurer is to keep a separate account, to be called "The District Fund Account," to be applied in defraying expences incurred by The Local Board in carrying the Act into execution, and not otherwise expressly

(a) Sect. 2. As to "highway," see stat. 15 & 16 Vict. c. 42. s. 13.

provided for; and The Local Board shall, as occasion may require, make and levy, in addition to any other rate, a rate or rates, to be called "General District Rates," for the defraying such expences as are charged upon that rate by the Act, and such other expences of executing the Act in any district as are not provided for by any other rate, or defrayed out of the District Fund Account. The only other clause which it seems necessary to refer to is the 117th section, by which The Local Board of Health, within the limits of their district, shall, exclusively of any other person whatsoever, *execute the office of and be surveyor* of highways, and have all duties powers, authorities and liabilities as any surveyor in *England*, so far as such powers, duties or authorities are not inconsistent with the provisions of the Act; and that the inhabitants of any district shall not be liable in respect of property within the district for any highway rate or other payment, not being a toll, for repairing highways out of the district; with a provision that the persons who are overseers at the time when the Act is applied may recover the amount of rates due, and, after paying liabilities, pay any surplus into the district fund account.

We have great difficulty in collecting from these enactments what course the Legislature intended The Board of Health to pursue, and whether it was intended that the money requisite for the repair of the highways should be raised by them, by highway rates as surveyors of the particular parishes, or whether they are to raise it by means of the district rates mentioned in the Acts.

It seems to us that one duty to repair the whole of the streets in the district, in whatever parish they are situate, is directly imposed upon the Board of Health by the Act; and that, with reference to this duty, they

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1854. are not to act as surveyors of the particular parish, but
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v. other acts, mentioned in the 68th section, to the streets,
NORWICH throughout the entire district, is a new duty created and
Local Board imposed upon the Board by The Public Health Act, 1848;
of Health. and the expences of so repairing and dealing with the
streets clearly fall within the earlier part of sect. 87, and
might be paid out of The District Fund Account, which
is, by the words of that section, to be applied to expences
“ incurred by the said Local Board in carrying this Act
into execution, and not otherwise expressly provided
for;” and this view of the case is strengthened by the
provision in sect. 117, which directs that any surplus,
collected by the persons who are surveyors at the time
when the Act is applied, is to be paid into The District
Fund Account, and not to the account of repairs for
the particular parish or place which those surveyors
represented. It is clear that the duties cast on the
Board by sect. 68 are larger with reference to what
is to be done to the highways than the duties with
respect to which the rates are to be levied under the
Highway Act

The proviso at the end of sect. 117 appears to us to
create no difficulty. Whether the Board was to repair
by means of the District rates, or rates levied distinctly
in each parish, they were to act as the surveyors of
highways; and the rates, whether of the former or the
latter kind, would, in respect of this application of them,
be in the nature of highway rates; the proviso therefore
dispensing with signature or allowance may well have
been inserted to remove all question whether these
might not be necessary for a district rate as they would
have been for a mere parish rate. We think, therefore,

that money for the repair of the highways in the district is to be levied by a district rate, and not by a rate under the Highway Act.

As to the sixth question: we think that the expences of widening the streets, and the purchase of land for buildings, are to be defrayed by a district rate made upon the whole district, subject of course to the power of the Board, in the cases in which they see fit, from the circumstances, to levy a special district rate in any locality which is to receive special benefit. We think that the effect of the order, and the Acts, have been to repeal the power of rating under the old local Acts, whilst it preserves some powers which may be useful in the district to which they are applicable. Thus, the rating powers being gone, the money for all that the Board are to do in such case must be raised by rate under the Public Health Act, 1848; whilst the powers of compulsory purchase in the city parishes may be useful in those parishes, and are accordingly retained and preserved.

Our answers to the second, third, fourth and sixth questions will be applicable to the questions put to us in the case of *Read v. The Local Board of Health of Norwich*.

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WILLIAM JAMES LE FEUVRE *against* JOSEPH
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By a provisional order of the General Board of Health, confirmed by statute, The Public Health Act, 1848, was applied to a district wholly comprised within a single municipal borough, and the corporation were constituted, by the council, The Local Board of Health.

L., an alderman of the borough, after

such confirmation, sold some iron to a party who had contracted to supply the local board with iron railings, and who purchased the iron for the purpose of performing his contract. *L.* afterwards, continuing to be an alderman, was elected mayor, and acted as such. An action was then brought against him for penalties, under sects. 28, 53, of stat. 5 & 6 *W.* 4. c. 76., for having acted as mayor while disqualified by being interested in a contract with the council.

Held : assuming a contract with such local board to be a contract with the council, within stat. 5 & 6 *W.* 4. c. 76. s. 28., and assuming also that a mayor, elected when alderman, is disqualified to act as mayor, under sect. 53, by reason of a disqualification as alderman :

That, nevertheless, this was not an interest in a contract within sect. 28, and there was no liability to penalty.

L. had contracted to construct some waterworks for commissioners for supplying the town with water. This contract not having been fully carried out, he gave it up, by deed, to the commissioners, they agreeing to pay him a certain balance if they abandoned the works, or completed them and obtained a specified quantity of water. The deed contained releases on each side, and covenants by *L.* not to molest the commissioners, that he had not injured the title, and for further assurances. The local board were afterwards constituted the commissioners. The works remained incomplete, but not abandoned, while *L.* was alderman, and also while he was mayor.

Held : on the same assumptions as before, that *L.* was not liable to a penalty : for that this contract was taken out of the operation of sect. 28 of stat. 5 & 6 *W.* 4. c. 76., as being a "security for the payment of money only," within stat. 5 & 6 *Vict.* c. 104. s. 1.

indirectly, by himself and his partner one *William Lankester*, divers shares and interests in divers contracts and employments with, by and on behalf of the council of the said borough."

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Second count, for three penalties alleged to have been incurred by acting as mayor of *Southampton* "after he had been elected out of the aldermen of that borough the mayor thereof; and, whilst he was disqualified to hold the office of mayor of that borough, and also the office of an alderman thereof, that is to say, by reason that defendant whilst so acting as aforesaid, and after he had been elected an alderman of that borough, and whilst he claimed to use and exercise the said offices, directly and indirectly, by himself and his partner" &c., as in the first count.

Plea : Not Guilty, By statute. Issue thereon.

On the trial, before *Talfourd J.*, at the last *Winchester* Summer Assizes, it appeared that the defendant was, in *November*, 1850, elected an alderman of *Southampton*; and in *November*, 1852, he was elected mayor, and had since acted as such.

By a provisional order of the General Board of Health, confirmed by stat. 13 & 14 *Vict. c. 108.* (Royal Assent, 15th *August* 1850), The Public Health Act, 1848, (except sect. 50) was ordered to "apply to and be in force within and throughout the entire area, places, and parts of places, comprised within the boundaries of the said town of *Southampton*, as the same were fixed for the purposes of" stat. 5 & 6 *W. 4. c. 76.*, "and that the town and places and parts of places shall be and constitute one district for the purposes of the said Public Health Act accordingly. And that the Mayor, aldermen and burgesses of the said town of *Southampton* shall be by the council of the said town, within and for

1854. the said district, constituted the Local Board of Health
 LE FEUVRE under that Act." After they were so constituted, The
 V. Local Board of Health ordered some works to be done,
 LANKESTER. in the course of which it was necessary to erect some
 lamps and a considerable quantity of iron railing. The
 superintendent of the works in 1851, whilst defendant
 was an alderman, ordered this iron work at a foundry
 belonging to defendant and his partner; and they supplied
 it. It appeared that much the greater part of this work
 was let to contractors who were to supply the ironwork;
 and it was the contractors who paid Messrs. *Lankester*
 for this part of the iron. But a very few small articles
 were for extra work, not included in the contract; and
 for those the town council, as Local Board of Health,
 paid Messrs. *Lankester* directly. It did not at all appear
 that at the time the goods were supplied Messrs. *Lankester*
 were aware that any part consisted of extras.

The plaintiff also put in evidence a deed, dated 22d
May 1846, and made between defendant, *T. B. and J. H.*,
 of the first part, and five of the commissioners acting in
 pursuance and execution of stat. 6 & 7 *W. 4. c. xcvi. (a)*,
 of the second part. This deed recited a contract
 bearing date 23d *March*, 1838, between a person of the

(a) Local and personal, public: "For maintaining the public conduits
 and other waterworks belonging to the town of Southampton, and for
 providing an additional supply of water for the inhabitants of the said town
 and neighbourhood." Sect. 9 constituted the Mayor, recorder, aldermen
 and councillors, with twenty six elected inhabitants, qualified as there
 described, commissioners. Sect. 10 incapacitated any person from acting as
 commissioner "in any case wherein he shall be in anywise personally or
 beneficially interested in the matter in question, either touching any con-
 tract relating to the execution of the powers of this Act, or otherwise
 (except as a creditor on the rates or assessments)." Sect. 13 imposed a
 penalty of 5*l.* for every occasion of a disqualified person acting as com-
 missioner. The Provisional Order, before mentioned, repealed these
 (among other) sections, from and after the passing of any Act confirming
 the Order.

name of *Collier* and the commissioners, by which *Collier* was to proceed without delay to make an artesian well, with the necessary works, and obtain a daily supply of not less than 40,000 cubic feet of spring water. And, if *Collier* abandoned the undertaking without completing it, he was to refund the price paid to him, amounting to 8,930*l.* It also recited a bond, by which defendant, *T. B.* and *J. H.* became sureties for *Collier*. It then recited other deeds, the effect of which was, that, *Collier* not being able to complete the work, his sureties took his contract from him and entered into fresh agreements with the commissioners in 1840, by which defendant, *T. B.* and *J. H.* were to do the work on certain terms. The deed then recited that much of the work had been done, and that disputes had arisen between defendant and his cocontractors, on the one part, and the commissioners on the other, as to whether defendant and his cocontractors were entitled to be paid part of the stipulated price, and as to whether they had broken some of the stipulated terms; and that, to compromise all these disputes, it was agreed that the work should be given up to the commissioners, that the commissioners should permit defendant and his cocontractors to retain the amount which had been paid to them, amounting to 8,886*l.* 2*s.* 9*d.*, and, in addition, 4,000*l.*, in full for all compensation claimed by them for various things then existing; and a further sum of 850*l.* was to be paid in case either the commissioners abandoned the works altogether, or succeeded in completing them. The indenture then contained a bargain and sale of the works to the commissioners, in consideration of a release of the 8,886*l.* 2*s.* 9*d.*, and the payment of 4,000*l.* down: with a release from the commissioners to the defendant

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and his cocontractors, and a covenant by the commissioners, on behalf of themselves and their successors, with defendants and his cocontractors, that, "in case the said commissioners, their successors or assigns, shall, at any time hereafter, abandon the said water works without having completed the same and brought the same into operation; or in case the said commissioners, their successors or assigns, shall complete the said works and bring the same into operation, and shall be able to obtain by means of the said works, in each and every day of 24 hours during the entire period of 12 calendar months next after the completion of the said works (any temporary deficiency arising by means of temporary accidents which may at any time happen to the machinery or works being excepted), from the chalk stratum of the depth of not less than 480 feet from the surface, and raise to the surface, and force and supply into the reservoirs on the *Southampton Common*, the full quantity of 40,000 cubic feet of pure spring water, the amount of such daily supply (except as before excepted) to be ascertained" by gauging, and the purity of the water supplied to be ascertained by investigation; "then, and in either of the said cases, the said commissioners, their successors or assigns, shall and will, by and with the first moneys which at or after the happening of such abandonment, or the expiration of such calendar months, as the case may be, shall be in, or under, or come to, the hands or controul of the said commissioners, their successors or assigns, and be applicable in that behalf," pay to defendant and his cocontractors 850*L.*, without interest, and without any deduction. The deed also contained covenants by the defendant and his cocontractors not to molest the commissioners in the enjoyment of the works given

up to them: that they had not by their own acts injured the title; and for further assurance. 1854.

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By the Provisional Order of The General Board of Health, and the confirming Act (13 & 14 *Vict. c. 108.*), The Local Board of Health of *Southampton* were constituted the commissioners for executing (amongst other local Acts) stat. 6 & 7 *W. 4. c. xcvi.*: and all contracts &c. by the commissioners were thenceforth to be transferred to and fulfilled by The Local Board of Health of *Southampton*. Before the time when the defendant became an alderman, The Local Board of Health were in possession of the waterworks, and had paid the 4,000*l.* They were still, at the time of the action, at work upon them, and had not yet obtained the stipulated quantity of water, so that neither of the contingencies on which the 850*l.* was payable had yet been determined; and so far the contract continued open; in all other respects it had been performed.

The learned Judge directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendant. *Kinglake* Serjt., in last *Michaelmas* Term, obtained a rule *Nisi* accordingly.

In this Vacation (*a*),

Crowder, *Montague Smith* and *H. Bullar* shewed cause. The action is to recover penalties which, by stat. 5 & 6 *W. 4. c. 76. s. 53.*, are incurred by any person who "shall act as mayor, alderman, or councillor, or auditor or assessor, for any borough" "without being

(*a*) The argument commenced on *February* 6th, before *Coleridge*, *Wightman*, *Erle* and *Crompton* Js., and was concluded on *February* 7th, before the same Judges. *Erle* J. left the Court towards the conclusion of the argument on the second day.

1854. duly qualified." The same Act, sect. 28, enacts: "that
 LE FEUVRE no person being in holy orders, or being the regular
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 qualified to be elected or to be a councillor of any such
 borough or an alderman of any such borough, nor shall
 any person be qualified to be elected or to be a councillor
 or an alderman of any such borough who shall not be
 entitled to be on the burgess list of such borough, nor
 unless he shall be seised or possessed of real or personal
 estate or both to the following amount," &c., "or during
 such time as he shall hold any office or place of profit,
 other than that of mayor, in the gift or disposal of the
 council of such borough, or during such time as he shall
 have directly or indirectly, by himself or his partner,
 any share or interest in any contract or employment
 with, by, or on behalf of such council; provided that no
 person shall be disqualified from being a councillor or
 alderman of any borough as aforesaid by reason of his
 being a proprietor or shareholder of any company
 which shall contract with the council of such borough
 for lighting or supplying with water or insuring against
 fire any part of such borough." It has been suggested that
 sect. 53 relates only to the disqualifications imposed by
 sect. 52, such as accrue on becoming bankrupt, insolvent,
 &c. But these disqualifications are such as accrue, after
 taking office, to "any person holding the office;" whereas
 the words of sect. 53 are "if any person shall act" "with-
 out being duly qualified;" and the acting without having
 made the declaration which must be made immediately
 after the election is there mentioned among other causes
 of penalty. Sect. 53 therefore must have a more ex-
 tensive application; and sect. 28 must be looked to.
 [Coleridge J. Sect. 53 imposes penalties on an auditor

and assessor acting without being duly qualified : there is nothing in sect. 52 as to the disqualifications of these officers.] That is conclusive. Besides, sect. 52 contains no positive qualification ; and sect. 53 imposes the penalty for acting "without being duly qualified." It is true that the disqualification arising from being interested in a contract is created by sect. 28, which is, in terms, applicable only to a "councillor" or "alderman ;" the word "mayor" having been by some oversight omitted. But, by sect. 49, the mayor must be elected out of the aldermen or councillors ; and, therefore, if the defendant, at the time of his election, was not qualified as alderman or councillor, he was not qualified as mayor ; *Regina v. Preece (a)*, *Regina v. Dixon (b)*. Unless this construction be put upon the Act, there is nothing in it to prevent the mayor from being interested in every contract. Possibly, in the case of the election of an outgoing alderman as mayor (which may be ; *Regina v. M'Gowan (c)*), the mayor might not be disqualified by reason of becoming contractor after he ceased to be alderman and while he continued mayor : that may be a *casus omissus*. But the difficulty does not arise here, as the defendant continued to be alderman while he was contractor. Then, assuming that the mayor is disqualified under the same circumstances as those under which an alderman would be disqualified, there are two grounds here for holding the defendant disqualified.

First : the supply of ironwork by the defendant and his partner for the works executed by order of the town council was a disqualification ; *West v. Andrews (d)*. [*Crompton J.* That was an action for penalties under

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(a) 5 Q. B. 94.

(b) 15 Q. B. 33.

(c) 11 A. & E. 869.

(d) 5 B. & Ald. 328.

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stat. 55 *G.* 3. *c.* 137. *s.* 6., the words of which are much more extensive than those of stat. 5 & 6 *W.* 4. *c.* 76. *s.* 28. If the contract with those executing the works had been colourable, so that *Lankester* was really interested in the contract, it would be another affair. The fact, that goods used in a contract were supplied by a member of the council, may be evidence that he has a concealed interest in the contract. But nothing of the sort is found here; and it would be a very strong thing to hold a member of the council liable to penalties, because in the ordinary course of trade a contractor bought articles at the member's shop.] It is within the mischief meant to be provided against. Suppose that the ironwork is objected to as of inferior quality, and that the council meet to determine whether or not it shall be rejected, or the question to be as to suing on the warranty which is implied by the sale; *Laing v. Fidgeon* (a), *Jones v. Bright* (b), *Chanter v. Hopkins* (c). The mayor ex officio is in the chair. It is not to be supposed that he can be unbiassed if he himself has supplied the goods. It is at least an interest in the contract. *Towsey v. White* (d) is an authority on this point, upon enactments much resembling that now in question. *Simpson v. Ready* (e) is an authority on the clause itself.

Next: the deed of 1846 is, by virtue of the provisional order and confirming Act, now a direct contract with The Local Board of Health of *Southampton*; and, as "The Mayor, aldermen and burgesses" of *Southampton* are "by the council of the said town" The Local Board of Health, it is a contract with such council. By sect. 12 of The

(a) 6 *Taunt.* 108.

(b) 5 *Bing.* 533.

(c) 4 *M. & W.* 390.

(d) 6 *B. & C.* 125.

(e) 12 *M. & W.* 736.

Public Health Act, 1848 (stat. 11 & 12 *Vict. c. 63.*), the "council shall exercise and execute the powers, authorities, and duties of such Local Board according to the laws for the time being in force with respect to municipal corporations in *England* and *Wales*," where the district consists of the whole or part of one corporate borough, as in the present case: other provisions are made in districts differently constituted; but in such a district as this the municipal council and The Local Board are in all respects identical. It is said that the case is within the proviso in stat. 5 & 6 *W. 4. c. 76. s. 28.*, that no person shall be disqualified from being a councillor or alderman by reason of his being a shareholder of any company which shall contract with the council for supplying with water any part of the borough, and the analogous proviso, as to the disqualification of members of The Local Board of Health, in stat. 11 & 12 *Vict. c. 63. s. 19.* As far as regards the latter Act, sect. 19 refers only to members of Local Boards elected under the provisions of the 12th and subsequent sections, not for such a district as this, but for one of the two other kinds of districts there mentioned, namely, districts consisting of the whole or parts of several boroughs exclusively, or districts consisting of the whole or parts of such boroughs and also of parts not within the boundary of any boroughs. The disqualifications in sect. 19 apply to these last two cases only: in the case of a district comprised in a single borough, it was thought enough to rest the disqualification on the provisions of the Municipal Corporate Act. Of course the exemptions in that section apply only where the disqualification applies. [*Coleridge J.* Then, in the case of districts like the present, a councillor, having a contract which The Board of Health adopts, becomes disqualified by the provisional

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order making the council The Local Board.] It does so, and not unreasonably: his new duties are inconsistent with his position as contractor. The case is like *Regina v. York* (a). If this be not so, the case of such a district as this is left entirely unprovided for, as to disqualifications connected with the duties of The Board of Health. The protection afforded by sects. 10 & 13 of stat. 6 & 7 W. 4. c. xcvi. will thus be lost, which seem to have been introduced by the Legislature lest the provisions of the Municipal Corporation Act should be found to be an inadequate protection. But, as to the provisoes in both Acts, the contract was never for the supply of water, but for the completion of an artesian well, the machinery by which the water was to be supplied. The existing contract, by the deed of 1846, is one which makes the defendant's right to 850*l.* depend on an act in the option of the council; he cannot be unbiassed in determining any question which may be raised as to whether the council shall or shall not discontinue the works. The case is therefore clearly within the mischief contemplated by the Act. Neither is it within stat. 5 & 6 Vict. c. 104. s. 1., which excepts from the operation of stat. 5 & 6 W. 4. c. 76. s. 28. "any security for the payment of money only;" for this is a contract to pay money on a contingency; and there are also covenants for further assurance, and others which prevent this from being a security for money only. [*Wightman J.* You will exclude many securities, upon that view. Suppose a mortgage with covenants.] What was merely incidental to the security by mortgage would probably not prevent the application of the clause. But here are other provisions, such as the release. It may be contended that the defendant is not liable to be sued

(a) 2 Q. B. 847.

for these penalties because it does not appear that the written consent of the Attorney General to the proceedings has been obtained, as made requisite by sect. 133 of stat. 11 & 12 *Vict. c. 63*. But that provision applies only to penalties incurred "under the provisions of this Act." No penalties, as has been shewn, are here claimed or claimable under that Act: the claim is under stat. 5 & 6 *W. 4. c. 76*.

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Kinglake Serjt. and *Phinn*, contra. In the first place, sect. 53 of stat. 5 & 6 *W. 4. c. 76*. seems to refer more naturally to the disqualifications specified in the section immediately preceding than to those in sect. 28. [*Wightman* J. Sect. 53 seems to include being unqualified under stat. 28 and becoming disqualified under sect. 52.] That is not consistent with the naming of the mayor in sect. 52 and the omission in sect. 28. And, next, sect. 28 is confined to the functionaries there named, and does not include the mayor. The disqualification must be connected with the character in which the party, whom it is meant to charge with the penalty, is acting. Here the defendant is charged with acting, not as alderman or councillor, but as mayor. The omission of the mayor from sect. 28 may not have been accidental: good reasons may have occurred to the Legislature for not disqualifying, upon all the grounds of disqualification expedient in the case of an inferior functionary, the head of the corporation, an indispensable officer. But, further, assuming the applicability of sect. 28 to the case of a mayor, the defendant is not brought within it.

First, as to the sub-contract for the iron. (On this point they were stopped by the Court.)

Next, supposing the deed of 1846 to shew a contract

1854. such as would, in its nature, fall within sect. 28, it is not
LE FEUVRE a contract with the council at all. The penalty is not
 V. claimed on the ground of a contract with The Board of
LANKESTER. Health. The 12th section of stat. 11 & 12 *Vict.* c. 63.
 applies the provisions of the Municipal Corporation Act
 only to the execution of the powers, authorities and
 duties of The Board of Health. But it is a fallacy to
 connect sect. 28 of the Municipal Corporation Act with
 such functions. That Act prescribes the performance of
 active municipal duties by the council ; of which a most
 important one is the management of the borough fund
 under sect. 92, and the levying of rates, where necessary.
 In order to secure the unbiassed performance of their
 duties, sect. 28 provides a disqualification where a member
 has a contract with the council. All that sect. 12 of stat.
 11 & 12 *Vict.* c. 63. does, is to fix, in the case of a
 district not extending beyond a single borough, upon the
 council as a body well fitted for the execution of duties
 distinct from their municipal functions ; other bodies, for
 the same purposes, are framed in the cases of districts
 of the two other classes. According to the argument on
 the other side, the mayor, if selected to act in the case
 of the other districts, would be acting as mayor. The
 Local Board of Health does not act through the ordinary
 officers of the corporation : it has distinct officers
 (sect. 37). The Act, throughout, uses the general term
 "Local Board of Health," as, especially, in the case of
 contracts ; sect. 85. They have no power, as such, over
 any borough funds ; but they may mortgage their own
 rates ; sects. 107 to 114. [*Crompton J.* If sued upon
 such securities, could they have recourse to the borough
 fund?] They could not. The distinction of the cha-
 racters in which a corporation, or its officers, act, where

the duties are not properly municipal, is illustrated by *Regina v. The Corporation of Poole* (a). It can hardly be that sect. 19 contemplated different disqualifications in the different cases. The penalties under the two Acts are applicable to different purposes; 5 & 6 W. 4. c. 76. s. 126., 11 & 12 Vict. c. 63. s. 133. But, further, stat. 5 & 6 Vict. c. 104. s. 1. is applicable. The contract, if it be still open, is a security for the payment of money only. The other stipulations, such as mutual releases, are ancillary to that. The covenants for quiet enjoyment and title would have been implied had they not been expressed; *Shep. Touch.* 160., *Line v. Stephenson* (b). The contingency does not make it less a security for money than a bond conditioned to pay money when *J. S.* shall return from *Rome*. The interest in it would pass by a devise of all the defendant's securities for money.

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Cur. adv. vult.

COLERIDGE J., on a subsequent day in this Vacation (*February 8*), delivered the judgment of the Court.

In this case we are of opinion that the rule must be made absolute. In the argument before us, several questions were raised, which in the end resolved themselves into three.

As to one of those, namely the sub-contract as to the supply of ironwork, we expressed our opinion during the argument. There was nothing in that to disqualify the defendant. The term sub-contract was used: but in fact it was no sub-contract; for it was not the case of a person having a contract with the council employing a member of the council to perform part of it. But, if

(a) 7 A. & E. 730.

(b) 5 New Ca. 183, in Exch. Ch., affirming the judgment of the Court of Common Pleas in *Love v. Stephenson*, 4 New Ca. 678.

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it had been a sub-contract, the word is not in the Act: to disqualify him, he must directly or indirectly have a share or interest in some contract or employment. In the present case all that is asserted is that the defendant, in the course of his trade, sold certain ironwork which was used in carrying out the contract. There is no attempt to shew fraud, or any previous concert between the defendant and the contractor by which the defendant was to have the benefit of the contractor's custom. Then this gives the defendant no share or interest in the contract, the existence of which neither affects the price of his goods nor the manner in which he is to be paid for them. It is said that it is within the mischief of the Act, for that the defendant, as mayor, may have to decide on the quality of his own goods. Even if the case be brought within the mischief, it is not within the words of the enactment: and we must not strain a penal enactment so as to bring cases within it. But many instances might be put in which kindred and affection, and other things clearly not within the Act, might bias the mind of the mayor to a greater degree, and so be as much within the mischief as this.

Then we come to the point mainly contested, viz. the effect of the deed of 1846. First, a preliminary question arises, namely, whether, on the Municipal Corporation being, by the council, made Local Board of Health, a contract with them in that capacity is a contract with the council within the meaning of stat. 5 & 6 W. 4. c. 76. s. 28. On that it is unnecessary to decide; and all that we wish to express is that we desire not to be understood to encourage the opinion that it is not.

Having said this, it brings me to the point on which

we decide the case. On looking at the deed, we find that *Lankester*, with others, had become party to a contract to complete works for supplying water. He and they made over the works to the commissioners, now represented by The Local Board of Health; and they agreed to pay him a sum of money, the balance of which, 850*l.*, was to remain unpaid till the happening of an alternative, if the commissioners abandoned the works without completing them, or, having completed them, obtained a specified quantity of water. In either case the commissioners were to pay the 850*l.* It seems to us, if that is all, that this is clearly within stat. 5 & 6 *Vict. c. 104.*, excepting from stat. 5 & 6 *W. 4. c. 76. s. 28.* "any security for the payment of money only." It is true the payment is only to be on the happening of a contingency; but the fact that the payment of money is to be on a contingency does not make the instrument securing the payment less a security for the payment of money. But the deed contains covenants, on *Lankester's* part, not to molest the commissioners, and for further assurance; and these are relied on by the plaintiff as making it not a security for money only. But these covenants are ancillary to the security, and are of a nature which, independently of stat. 5 & 6 *Vict. c. 104.*, would not be within stat. 5 & 6 *W. 4. c. 76.*

It will be observed that we have assumed, throughout, that sect. 28 applies to the case of the mayor. It has not been necessary to decide this; as, assuming it to do so, the plaintiff's case fails.

Rule absolute.

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M E M O R A N D U M.

In this Vacation, Mr. Justice *Talfourd* died suddenly at *Stafford*, during the Assizes, while charging the Grand Jury for *Staffordshire*.

In the same Vacation, *Richard Budden Crowder*, Esquire, one of Her Majesty's Counsel, was appointed a Judge of the Court of Common Pleas, having first been called to the degree of the coif, when he gave rings with the motto *Lex omnibus una*. He afterwards received the honour of Knighthood.

END OF HILARY VACATION.

CASES

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ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

EASTER TERM,

XVII. VICTORIA.

The Judges who usually sat in Banc in this Term
were:

Lord CAMPBELL C. J.		ERLE J.
WIGHTMAN J.		CROMPTON J.

The QUEEN *against* The Inhabitants of SANDON. *Friday,*
April 21st.

A JUSTICE of peace for *Hertfordshire* issued a summons to the surveyors of the highways of the parish of *Sandon*, in *Hertfordshire*, to appear to answer an information laid before him, for non-repair of a highway in that parish, alleged to be repairable by the inhabitants. The surveyors appeared before two justices of the county, and denied the liability: whereupon the justices ordered an indictment against the inhabitants to be preferred at the next Assizes for *Hertfordshire*.

An indictment preferred at the Assizes, for non-repair of a highway, by order of justices under stat. 5 & 6 W. 4. c. 50. s. 95., is removeable by certiorari at the instance of the defendants.

1854. The indictment was preferred accordingly at such assizes, and a true bill found. The defendants removed the indictment into this Court by certiorari.

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Lush now moved for a rule to shew cause why a procedendo should not issue. The proceeding has taken place under sect. 95 of the General Highway Act, 5 & 6 W. 4. c. 50. The justices under that section may order the indictment to be preferred either at the Quarter Sessions or at the Assizes: and, by the proviso, an indictment preferred at Quarter Sessions may be removed by certiorari. But no power is given to remove an indictment preferred at the Assizes. Sect. 107 enacts that no "matter or thing done or transacted in or relative to the execution of this Act, shall" "be removed or removeable" "by certiorari." Taking the two sections together, it seems that the certiorari may go to remove from Quarter Sessions, but not from the Assizes. [*Crompton J.* Express words are wanted to take away certiorari. Lord *Campbell C. J.* It would be very odd if you could remove from one and not from the other.] The Quarter Sessions is a Court of lower rank than that of the Assizes. [*Crompton J.* A power of reviewing is desirable. Lord *Campbell C. J.* The indictment is ordered under the Act; but it is found at common law; the case therefore is not within sect. 107.]

Per CURIAM (a).

Rule refused (b).

(a) Lord *Campbell C. J.*, *Erle* and *Crompton Js.* *Wightman J.* had left the Court.

(b) See stat. 16 & 17 Vict. c. 30. ss. 4. to 8.

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STOESSIGER *against* The SOUTH EASTERN
Railway Company.

Friday,
April 21st.

THE declaration stated that defendants were proprietors of a railway, to wit a railway from *Strood* in *Kent* to *London*, and were common carriers of goods and chattels for hire: and plaintiff caused to be delivered to defendants, as such common carriers, a certain parcel and divers goods and chattels of plaintiff contained therein, to wit certain papers and documents of small value and the sum of 9*l.* 10*s.* in cash, to be safely and securely carried and conveyed for plaintiff by defendants from *Strood* upon the said railway and upon and by other railways and conveyances, and to be caused by defendants to be safely and securely delivered for plaintiff to the consignee of the said parcel, to wit one *Gideon Goold*, at a certain other place, to wit *Birmingham*, for certain reasonable reward: yet defendants, not regarding their duty as such common carriers, but contriving &c.,

C., being indebted to *G.* in more than 10*l.*, framed a document, directed to himself, ordering himself, three months after date, to "pay to my order" the amount. The document had the stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer's name. *C.* wrote on it his acceptance, and caused it to be forwarded in a parcel,

directed to *G.*, by a common carrier, in order that *G.* might add his name as drawer.

On an action against the carrier for the loss of other goods, of less value than 10*l.*, contained in the same parcel, the defence was that the parcel contained a bill, order, notice, security for payment of money, or writing of value, exceeding 10*l.*, and that no notice had been given of the contents, or increased rate of carriage paid or contracted for, though the carrier had publicly exhibited in his office a notice requiring such increased rate for articles within stat. 11 *G.* 4 & 1 *W.* 4. c. 68. s. 1. The jury found that the incomplete bill was not, at the time of the delivery to the carrier, of any value.

Held: that it was not a bill, order, note, security for payment of money, nor writing of any value, at the time of such delivery.

Quære, per *Erle J.*, whether, if the jury had found the value in fact, such finding could or could not have been supported.

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did not nor would safely or securely carry &c. the parcel to *Birmingham*, nor there cause the same to be safely and securely delivered for plaintiff to the consignee, but, being such carriers, so carelessly and negligently conducted themselves in the premises that, by and through the carelessness negligence and improper conduct of defendants in that behalf, the said parcel was opened after the same had been delivered to defendants as aforesaid, and before the same was delivered to the consignee: and the said sum of 9*l.* 10*s.* in cash, being part of the contents of the said parcel, was abstracted therefrom by some person or persons whose names or name are to plaintiff unknown: and the parcel and part only of the said goods and chattels contained therein, to wit the said papers and documents of small value, were delivered to said consignee; and the residue of the goods and chattels contained in the parcel, to wit the said sum of 9*l.* 10*s.* in cash, was never delivered to the consignee: whereby the said sum of 9*l.* 10*s.* was not safely or securely carried or conveyed or caused to be delivered as aforesaid, but became and is wholly lost to plaintiff.

The only plea material to the decision of the Court was the third, which was as follows.

That the said parcel, at the time of the said delivery thereof to and receipt by defendants of the same, contained property of a certain description, to wit money and current coin of the realm, and a bill of exchange for the payment of money; and the value of the same exceeded the sum of 10*l.*: and that the said parcel, with its said contents, was delivered to defendants, as common carriers of goods by land, to be by them conveyed and

carried as in the declaration mentioned at a certain office or receiving house of defendants for the receipt of goods to be carried by them, as such carriers as aforesaid. That, before and at the time when the said parcel with its said contents were so delivered at the said office or receiving house, defendants had caused to be affixed, and there was then affixed, according to the form of the statute in such case made and provided, in legible letters or characters, in a public and conspicuous part of the said office or receiving house, a notice stating that a certain increased rate of charge therein mentioned was required to be paid, over and above the ordinary rate of carriage, for the safe conveyance of certain articles in the said notice mentioned; and among which money and bills of exchange were included and stated. That the nature and value of the said contents of the said parcel were not declared by plaintiff or by the person who sent or delivered the said parcel and its contents at the said office or receiving house; nor was the said increased charge, nor any engagement to pay the same, accepted by the person receiving the same at the said office or receiving house.

Replication. That the value of the said parcel, and its contents, did not exceed the sum of 10*l*.

Issue thereon.

On the trial, before *Crompton J.*, at the *Westminster* Sittings in last *Michaelmas* Term, the following facts appeared. The plaintiff was a commercial traveller in the employment of *Gideon Goold*, named in the declaration, who resided at *Birmingham*. A person named *Cruttenden*, residing at *Chatham*, being indebted to *Goold* to the amount of 11*l*. 10*s.*, gave to the plaintiff at

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1854. *Chatham*, to be by him transmitted to *Goold*, an instrument of which the following is a copy:

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Company.

£11: 10: 0. *Birmingham* Sept. 1852.

Three months after date pay to my order the sum of eleven pounds 10s. value received.

Mr. *Cruttenden*,
Jeweller &c.

Chatham. Accepted at

Goold was to complete this instrument, which was stamped with a two shilling bill stamp, by signing his own name as drawer. The plaintiff had no authority to draw or accept bills for *Goold*. He accordingly inclosed the document, together with gold and silver to the amount of 9*l*. 10*s*. on account of a private debt of his own to *Goold*, in a parcel, which he directed to *Goold* at *Birmingham*, and delivered to defendants, at their station at *Strood*, to be carried; and which they received for that purpose. There was affixed, in a conspicuous part of the office where the parcel was received, a notice, requiring an increased rate of charge, according to stat. 11 *G.* 4 & 1 *W.* 4. c. 68. ss. 1. and 2., for the articles specified in sect. 1. No notice of the value or contents of the parcel was given, nor any increased rate paid or agreed for. The cash was abstracted from the parcel, by some means which did not appear, before it reached *Goold*: the remainder of the contents came safely to hand.

On this evidence, the counsel for the defendants contended that the parcel contained, within the meaning of the Carriers' Act, stat. 11 *G.* 4 & 1 *W.* 4. c. 68. s. 1., gold or silver coin of the realm, and a bill, note or security for payment of money, or writing, the value of the whole exceeding 10*l*. and that, no notice of the

value or contents having been given, or increased rate paid or contracted for, the defendants were not liable for the loss. The plaintiff's counsel contended that the document, being incomplete, was of no value as a security or writing, and that therefore the parcel contained no articles, within the meaning of the statute, of the value of more than 9*l.* 10*s.* The learned Judge directed a verdict for the plaintiff for 9*l.* 10*s.*, reserving leave to move to enter the verdict for the defendant if the skeleton bill was an article within the Carriers' Act, and was of such a value as to make together with 9*l.* 10*s.* more than 10*l.* It was agreed that the jury were to be taken as finding, so far as it was a question for them, that the writing was of no value.

In last *Michaelmas* Term, *Willes* obtained a rule *Nisi* accordingly.

Alfred Wills now shewed cause. The question is, whether this document was of any value as a bill or note, security or writing, within the meaning of the statute. It was not a bill of exchange; for there was no drawer. Nor was it a promissory note. In *Peto v. Reynolds* (a) a person drew a bill of exchange without any direction; and another person accepted it in defendant's name, professing to do so as agent for defendant. The Court appeared disposed to consider that this was not a bill of exchange, though, if the defendant ratified the promise to pay, it might be treated as his promissory note. But there the document, whether a bill or promissory note, was a promise by a person named, to pay to the order of another named: here *Gould* has not become a party in any way; nor is he named. There is neither drawer or payee. The

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(a) 9 *Exch.* 410.

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only name on the document is that of *Cruttenden*; and he does not engage to pay, except to the order of a person not named, and who has in fact made no order. *Cruttenden* cannot have meant to pay the bearer generally. [Lord *Campbell* C. J. That would be utterly contrary to his meaning in fact. *Willes* said that he would offer no argument in favour of its being a promissory note, but would avail himself of that point, should the Court think it tenable.] Nor does it fall under the head of "securities for payment of money." In *Rex v. Hart* (a) a person signed a blank acceptance on a paper which had a six shilling stamp: it was afterwards taken away and filled up as a bill of exchange for 500*l.* *Littledale* J., *Bolland* B. and *Bosanquet* J. held that this, at the time of such taking, was not a "bill, note, warrant, order, or other security whatsoever for money or for payment of money," within stat. 7 & 8 *G.* 4. c. 29. s. 5. *Littledale* J. said that the instrument was "only in a sort of embryo state." [Lord *Campbell* C. J. No amount was there named when the document was taken.] That would have made no difference: the security, when completed, would have been effectual for any amount that might be inserted within the limit of the stamp; *Russel v. Langstaffe* (b). [Lord *Campbell* C. J. It is more like an authority for making a security than an actual security.] Further, if it is contended that this was a writing of the value of 1*l.* 10*s.*, the answer is that the value which is to bring the case within the statute must be a value existing at the time of the delivery to the carrier. But, as no one had authority to complete the instrument besides *Goold*, the paper could never acquire any value

(a) 6 C. & P. 106.

(b) 2 *Doug.* 514. See *Abruham v. Skinner*, 12 A. & E. 763.

till it reached *Goold's* hands, that is, till the duty of the carrier was over. The value, at the time of the delivery, was merely that of the paper; no value derived from the writing on it existed at that time. The supposed value is in the piece of paper *plus* the authority to do something to it which has not been done here. The piece of paper was sent by the carrier: the authority could not be sent: and neither of these elements apart from the other is sufficient to make the instrument of value. A similar reasoning was pursued in *Rex v. Clark (a)*. There are many cases in which a party to an incomplete instrument becomes liable upon the completion; *Schultz v. Astley (b)* is an instance, and represents a class of cases. But the liability never arises, and consequently the value of the instrument never is created, unless the completion is by an authorized party. Suppose this instrument to have been lost, no one except by means of forgery, or at least of some fraud, like that in *Regina v. White (c)*, could make it available. [Lord Campbell C. J. You need not labour to shew that a person having no authority to sign it would commit a forgery in doing so (d). *Crompton J.* If *Goold* had died during the transit, could his executors have completed the instrument? They could not. In whose name could they sign? [Lord Campbell C. J. If the carrier had lost the paper, could *Goold* have recovered the sum named in it by an action for damages against the carrier? He could not. And this shews that the object of the statute does not require the interpretation for

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(a) *Russ. & R.* 181.(b) 2 *New Ca.* 544.(c) 1 *Den. Cr. C.* 208.(d) See *Rex v. Bateman*, note (b) to *Regina v. Wilson*, 2 *C. & K.* 529; *Rex v. Birkett*, *Russ. & R.* 86.

1854. which the defendants must contend; because, if the instrument be worthless, the carrier requires no protection from the consequences of its loss.

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Willes, contra. From the list of articles in sect. 1 it appears that the Legislature did not mean to confine the provision to such things as are valuable in the hands of every person: gold and silver are so; but "writings" and "title deeds," though very valuable to their owners, are commonly worthless to others. Therefore the Court will not inquire to whom this paper was valuable. After the paper left *Cruttenden's* hands, any one deriving authority from *Goold* might make it complete and valuable. In the case put by *Crompton J.*, *Goold's* executors or administrators could have signed it; *Murray v. The East India Company* (a) seems to go as far as that. In *Schultz v. Astley* (b) it was held that the conduct of the acceptor gave such authority even to a stranger. [*Crompton J.* That case goes to the utmost extent of the law.] But it is enough that the paper was valuable as a writing; it was that which the creditor might use, and might obtain money for by discounting it. Further, suppose the paper to have got into the hands of a bonâ fide transferee. [Lord *Campbell* C. J. How could that possibly happen without its passing through *Goold's* hands?] It is not probable, but it seems not impossible; the cases are collected in Mr. *Smith's* note (c) to *Miller v. Race* (d). [*Wightman J.* If a man found it, and inserted his own name, and indorsed it over for value, might the indorsee recover on it?] That might be

(a) 5 B. & Ald. 204.

(b) 2 New Ca. 544.

(c) 1 Lead. Ca. 258

(d) 1 Burr. 452.

maintained (a). [Lord Campbell C. J., referred to
Young v. Grote (b).]

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LORD CAMPBELL C. J. I am of opinion that this rule ought to be discharged. The case of the defendants is clearly untenable unless this paper can be brought within sect. 1 of the Carriers' Act, 11 G. 4 & 1 W. 4. c. 68. It must be shewn to be a bill, order, note or security for payment of money, or writing, of such value as to make up, with the 9*l.* 10*s.*, more than 10*l.* It is not a bill of exchange; there is neither drawer nor payee. Nor is it a promissory note to pay any one who might happen to be the bearer; that *Cruttenden* should become liable generally to the bearer was quite contrary to his intention. Nor is it a security for money; for we must look at the time of the delivery to the carrier; and at that time nothing could be claimed on it. I think it is a writing; it would be very difficult to define a writing so as not to include this paper. Then the question is as to the value. If this writing possess any value beyond that of the paper material, that value must be 11*l.* 10*s.* Now can it be said that the writing bore that value at the time of its delivery to the carrier? I do not see that it was of intrinsic value to any person. It empowered a particular individual to claim to that amount, by putting his name to it; but that had not been in fact done by the individual, *Goold*. I cannot agree that the executors of *Goold* could have made it valuable by putting to it his name, or their own, or any name whatever. Nor could any one have bestowed value on it, who, not being contemplated by *Cruttenden*, had found it. It is therefore in entire accord-

(a) See contra, *Aude v. Dixon*, 6 Exch. 869.

(b) 4 Bing. 253.

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ance with all the authorities, to hold that this writing was of no value at the time of its delivery to the carrier.

WIGHTMAN J. The question is, whether that which beyond all doubt was a writing was, at the time of its delivery to the carrier, of a value exceeding 10*l*. The fallacy of the argument lies in attempting to make the power of conferring the value at the end of the destined carriage the criterion of the value at the time of the delivery. I think the rule should be discharged.

ERLE J. I am of the same opinion. This being an imperfect instrument, and not a complete bill, order, note or security for money, but clearly a writing, we are not bound to say that, in point of law, it was of value. I use that expression, because it may be that, this being, except for the absence of the name of the drawer, an accepted bill of exchange, a jury may in a similar case find that the writing is of value; and I do not wish to preclude myself from considering whether such a finding might not be sustained.

CROMPTON J. I am of the same opinion; and I have no remarks to add.

Rule discharged.

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ARTHUR JULIAN HARRIS *against* ROBERT CARTER *Monday,*
and ROBERT BROOKS. *April 24th.*

COUNTS for work and labour, and on accounts stated. Pleas: 1. Except as to 33*l*., Never indebted. 2. As to 33*l*., Payment into Court. The plaintiff took issue on the first plea, and took the money out of Court on the second.

On the trial, before *Platt B.*, at the last *Liverpool* Assizes, it appeared that the plaintiff was a sailor, and that his claim was against the defendants, as owners of the ship *Monteagle*, for wages on a voyage out to *Melbourne* and home. Before sailing, the plaintiff signed articles by which he agreed for the voyage, out and home, at 3*l*. per month. The defendants had paid money into Court at that rate for the whole voyage: the plaintiff claimed to be paid at the rate of 6*l*. per month for the homeward voyage. It appeared that, on the arrival of the vessel at *Melbourne*, many of the crew deserted: the captain, to induce the others to stay, promised to pay 6*l*. per month on the home voyage, and signed fresh articles with the plaintiff and the rest of the remaining crew to that effect. After this, more of the crew deserted; the captain had some of them put in prison;

Plaintiff, a sailor, signed articles, for a voyage out to *M.* and home, at 3*l*. per month. On the arrival of the ship at *M.* several of the crew deserted. The captain, to induce the rest to remain, signed fresh articles with plaintiff and others at the rate of 6*l*. per month for the home voyage. Plaintiff continued in the vessel till her arrival home, and then sued the shipowner for work and labour. Defendant paid money into Court at the rate of 3*l*. per month. Plaintiff claimed to be paid at the rate of 6*l*. for the home voyage. On the trial, there

was some evidence that at *M.* the captain had consented to the discharge of some of the crew. The Judge asked the jury if the plaintiff himself had been discharged before entering into the fresh articles. On their answering that he had not, the Judge directed a nonsuit.

Held, on a motion for a rule for a new trial, that the nonsuit was right; for that there was no evidence of any circumstances to free the plaintiff from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorize the captain to bind the owners by such a contract.

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but, being unable to get fresh hands, he finally agreed with four of the deserters to take them out of prison, and pay them high wages, and discharge them at *Bombay*, if they would work the vessel so far home as that port. This was accordingly done; and these men were discharged at *Bombay*. The plaintiff served on the whole voyage home till the vessel arrived safe in *London*.

On the proof of these facts the learned Judge declared his opinion to be that there was no evidence to go to the jury in support of the plaintiff's claim. The plaintiff's counsel urged that there was evidence that the captain had, at *Melbourne*, consented to the discharge of some of the crew, and had thereby improperly increased the labours of the plaintiff and those who remained and did their duty; which, they contended, might form a consideration for a fresh promise. The learned Judge refused to leave any question to the jury, except as to whether the plaintiff himself had been discharged before the fresh contract. The jury having answered in the negative, his Lordship directed a nonsuit, with leave to move to enter a verdict.

C. Milward now moved to enter a verdict pursuant to the leave reserved, or for a new trial on the ground of misdirection. The nonsuit proceeded on the authority of *Stilk v. Myrick* (a): but there Lord *Ellenborough* says: "If they" (the crew in that case) "had been at liberty to quit the vessel at *Cronstadt*, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty

(a) 2 *Campb.* 317.

upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages." [Lord *Campbell* C. J. If anything had occurred to relieve the plaintiff from the engagement he contracted when he signed the articles in this country, he might enter into a fresh contract. What is it that, as you say, set him free?] There was evidence that the captain discharged at least one of the seamen at *Melbourne*: that should have been left to the jury. [*Wightman* J. Do you contend that, whenever the captain on a foreign voyage discharges one of the crew, improperly if you will, all the rest are at liberty to leave the ship?] Perhaps not: but, if there could be any improper discharge of any portion of the crew which would set the remainder free, there was some evidence here of their being set free. The captain might have exercised the powers given him by stat. 13 & 14 *Vict. c. 93.* sects. 71, 72, and did not. It is plain, from the high pay given to the deserters who went on to *Bombay*, that the vessel was short-handed, and the labour of the plaintiff and those who did their duty greatly increased.

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Lord CAMPBELL C. J. I am of opinion that the nonsuit was most properly entered, and ought not to be disturbed. Had the plaintiff been relieved from the obligation which he had contracted towards the ship-owners, he might have entered into a fresh contract, and, under some circumstances, the captain might have had authority to bind the owners by entering into a fresh agreement on their behalf with him. Had there, for instance, been an entire change of the voyage it might have been so. But here there were no circumstances of that kind. The voyage remained the same voyage for

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which the men had shipped; there was no consideration for a promise to the plaintiff; and the captain had no authority to bind the owners. The whole foundation for the new contract was the desertion at *Melbourne*. We need not consider what happened afterwards at *Bombay*; for that could not affect the contract made at *Melbourne*. Now nothing which happened at *Melbourne* could set the plaintiff free, or be any consideration for a fresh promise.

I cannot altogether agree with Lord *Ellenborough*, in *Stilk v. Myrick* (a), in discarding the ground of public policy on which Lord *Kenyon* relied in *Harris v. Watson* (b); for I think it would be most mischievous to commerce, if it were supposed that captains had power, under such circumstances, to bind their owners by a promise to pay more than was agreed for. There will be no rule.

WIGHTMAN J. concurred.

ERLE J. concurred.

CROMPTON J. I should be very sorry to let it be supposed that there was the least doubt in this case.

Milward took nothing by his motion.

(a) 2 *Campb.* 317.

(b) 1 *Peake's N. P. C.* 72.

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Sir ROBERT EDWARD WILMOT, Baronet, *against* Tuesday.
JOSEPH ROSE. April 25th.

THIS was an action brought in the County Court of *Derbyshire* holden at *Derby*, to recover 25*l*. The plaintiff was as follows.

"Sir Robert Edward Wilmot, of" &c., "baronet, complains of Joseph Rose, of" &c.: "For that the said Joseph Rose, having become or being the purchaser of a crop of wheat of one Thomas Rose, a person engaged in husbandry, on lands situate in" &c., "belonging to the said Sir R. E. Wilmot, and by him let to farm to the said Thomas Rose, he the said Joseph Rose, on the 17th day of September 1853, and at divers other times between" &c., "did unlawfully take, use and dispose of the straw and other produce of the said lands, contrary to the manner, and for other than the purpose, in or for which the said Thomas Rose ought to have taken, used or disposed of the same if no assignment thereof had been executed or sale thereof made, contrary to the form of the statute" &c.: "whereby the said Sir R. E. Wilmot has sustained damage" &c.

The cause came on for trial before the judge of the said court and a jury, on 25th October 1853. On the trial, the following facts were proved in evidence.

By an agreement, under the hands of the plaintiff

Held: that this prohibition as to purchasers is not confined to purchasers under an execution.

Sect 11 of the Act "To regulate the sale of farming stock taken in execution," 56 G. 3. c. 50., enacts that no assignee of any bankrupt or insolvent debtors' estate, or under any bill of sale, nor any purchaser of the goods, chattels, stock or crop of any person employed in husbandry, on lands let to farm, shall use or dispose of any produce of such land in any other manner, and for any other purpose, than such bankrupt, insolvent, or other person so employed in husbandry, ought to have used or disposed of the same if there had been no bankruptcy, assignment or sale made.

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and *Thomas Rose*, dated 26th *March* 1852, plaintiff had demised and let to farm to *Thomas Rose*, at the rent of 59*l.* 15*s.* 4*d.*, a farm and lands, from 25th *March* then past, for one year, and so on from year to year, unless and until notice &c. The letting and renting to be upon terms and conditions, one of which, on the part of the tenant, is in the words following: "And shall not be at liberty, at any time during the continuance of this agreement, to sell, take or carry away, or otherwise dispose of, any hay, straw, fodder, vegetable crops, muck, dung, manure or compost, which shall arise or be made and produced from or upon the said premises, or any part thereof; but, from time to time, in a good and husbandlike manner, to spend, spread, use and employ, upon such part of the said premises as may be most proper to receive the same, all such muck, dung, manure and compost as aforesaid; and, at the expiration of this agreement, leave on the said premises, for the benefit of the succeeding tenant, all such hay, straw, fodder, muck, dung, manure and compost as shall have arisen or been made upon or from the said premises, or have been brought thereon, and which shall not have been eaten, consumed, spent, spread or employed on the said premises, as aforesaid, without receiving any compensation for the same, either from the landlord or succeeding tenant, except such sum or sums of money as two indifferent persons" &c. (to be chosen by the parties, and to name an umpire) "shall determine to be the fair value of the hay, straw and manure of the last year's produce to consume on the said premises:" with provision for the case of either party refusing to name a referee.

Thomas Rose, after the execution of the lease, entered

into possession, and became and was the occupier, of the farm and lands, and, from thence, until and at the time of the sale and removal of the wheat and straw after mentioned, continued in such occupation and possession, and was, during all that time, engaged or employed in husbandry on the said farm and lands, by virtue of the said demise, and on the terms of the said lease. After the said occupation had continued as aforesaid for more than a year, that is to say on the 30th *August* 1853, a sale of the goods, chattels and effects then being in and upon the said farm and lands, including the crops then growing and being in and upon the said farm and lands, was publicly advertized to take place by public auction on 5th and 6th *September* 1853. On the morning of the said 6th *September*, and before the crops, or any part thereof, were or was put up to auction, the auctioneer was served by the agent of plaintiff, duly authorized by plaintiff, with a notice in writing, of which the following is an extract: "I am directed to inform you that the hay, straw and turnips arising from Mr. *Rose's* crops must be consumed on the premises, according to his agreement; and to which I refer you." Which notice was signed by the agent as such. At a subsequent part of the same 6th *September*, the sale by auction of the said goods, chattels and effects, including the said crops, took place in and upon the said farm and lands: and, amongst other things, a crop of wheat, part of the said crops so then growing and being in and upon the said farm and lands, was put up to auction; and defendant then and there was, and was duly declared to be, the highest bidder, and the purchaser thereof. The said crop of wheat was, on the day last aforesaid,

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and at the said sale, sold to defendant; and defendant then and there became the purchaser thereof. On the 9th of the same month, defendant was served by the solicitors and agents of plaintiff, duly authorized &c., with a notice, from which the following is an extract: "As solicitors to Sir *Robert Edward Wilmot*, of" &c., "we hereby beg to give you notice that any hay, straw, fodder, vegetation crops, muck, dung, manure or compost, lately sold on the farm now or lately occupied by Mr. *Thomas Rose*, of" &c., "held under the said Sir *R. E. Wilmot*, cannot be legally removed from the said farm, but ought to be consumed thereon, according to agreement between the said Sir *R. E. Wilmot* and the said *Thomas Rose*. And, understanding that you have purchased some of such things, we hereby further give you notice not to remove any of them, or to deal therewith otherwise than by law is allowed; and that proceedings at law will be taken against you should you act contrary to this notice." Which notice was duly signed by the said solicitors as such agents.

On the 17th of the same *September*, defendant took the crop of wheat, including the straw thereof, then being in and upon the said farm and lands, and carried away the wheat and straw off and from the said lands, against the will of plaintiff, as defendant then well knew, and in express defiance of the remonstrances of plaintiff, who was then and there present in person, and protested to defendant against the removal, and forbade him so to remove the same, or any part thereof.

Defendant did not offer any evidence; but it appeared from the cross examination of plaintiff's witnesses that all rent due to the plaintiff, up to 29th *September* following the sale, had been paid in advance,

and that he had accepted a guarantee for the rent up to *Lady Day* 1854.

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It was stated by plaintiff's attorney, in opening the case, that the sale of the effects took place under a mortgage made by the tenant to a creditor: but no evidence was given of this fact.

Under these circumstances, it was contended, on the part of plaintiff, that the case came within sect. 11 of stat. 56 *G.* 3. c. 50. The Judge ruled and decided that, in point of law, having regard to the facts proved, the action could not be sustained: and he thereupon nonsuited the plaintiff. From which decision the plaintiff now appealed.

K. Macaulay, for the appellants. The question is whether sect. 11 of stat. 56 *G.* 3. c. 50. is confined to the case of sales under an execution. It enacts that no assignee of any bankrupt or insolvent's estate, "nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock or crop of any person or persons engaged or employed in husbandry, on any lands let to farm, shall take, use or dispose of any hay, straw, grass or grasses, turnips or other roots, or any other produce of such lands, or any manure, compost, ashes, seaweed or other dressings intended for such lands, and being thereon, in any other manner, and for any other purpose, than such bankrupt, insolvent debtor, or other person so employed in husbandry, ought to have taken, used or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed, or sale made." This is in terms applicable to all purchases. It is true that the title of the statute is "An Act to regulate the sale of farming stock taken

1854. in execution." [Lord *Campbell* C. J. The title of a
 WILMOT statute, 27 G. 3. c. 44., was relied upon in *Free v.*
 v. *Burgoyne* (a).] The first ten sections of stat. 56 G. 3.
 ROSE. c. 50. certainly relate to crops and produce in the
 hands of the sheriff. But sect. 11 relates to a different
 subject matter. The sheriff could have nothing to do
 with the acts of the assignee of a bankrupt or insolvent.
 And, further, the enactment of sect. 11 is, that the pur-
 chaser may not dispose of the goods otherwise than the
 tenant might; but the sections relating to goods taken
 by the sheriff provide for agreements with the sheriff.
 [Lord *Campbell* C. J. Is sect. 11 confined to crops
 growing on the farm?] There may be ground for so
 holding; but the question is not important in this case.

Manisty, contra. Sect. 11 must be read with the pre-
 ceding sections. Sect. 1 prohibits the sheriff, after
 notice, from carrying off, or selling for the purpose of
 being carried off, the farm any straw &c., the produce
 of the farm, which, by agreement, ought not to be
 taken off; but, by sect. 3, he may sell it upon the
 purchaser agreeing to expend it as, by custom or agree-
 ment, it might be expended. Now, had the enact-
 ments stopped there, they might possibly be understood
 as, by implication, prohibiting the purchaser from carry-
 ing away the produce; but it was, apparently, not
 thought safe to leave this to implication; and, ac-
 cordingly, sect. 11 contains an express prohibition; and
 this section, further, enables the purchaser to enter
 upon the farm and there expend the produce, which
 otherwise he could not do without committing a trespass.

[*Crompton J.* It looks as if the Legislature, after providing for produce taken by the sheriff, thought it necessary to add provisions for produce taken by assignees of any kind.] Had that been so, the enactments would have been similar. If the construction on the other side be correct, a purchaser, by sample, in the market, of growing crops would not be safe. In *Ridgway v. Lord Strafford* (a) a landlord was held liable to his tenant in damages for selling distrained hay and manure, subject to the condition of its being consumed on the farm, as by the lease between the two it ought to have been; the consequence was that, owing to the sale having been subjected to this condition, the articles sold realized less than their full price. Now, had sect. 11 been general, it would have protected this sale, inasmuch as an unconditional sale would have been illegal. [*Crompton J.* That section does not appear to have been brought before the Court.] The statute was under discussion; sect. 11 can hardly have escaped notice. [*Lord Campbell C. J.* How do you get rid of the words "any" bill of sale, and "any" purchaser.] They are meant to extend the provision to any sale whatever of produce taken in execution. [*Erle J.* That is provided for before.] Not as to the acts of purchasers.

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Lord CAMPBELL C. J. I think the nonsuit was wrong. It proceeded on the ground that sect. 11 is confined to purchasers of what has been taken in execution. I think it is not so confined. The title and preamble do indeed contemplate only sales under execution: and, if the words of sect. 11 admitted of any reasonable doubt, we

(a) 6 *Exch.* 404.

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would look to the title and preamble, and endeavour to construe the enactments consistently with them. This mode of construing a statute has been resorted to in the case of the statute limiting the time for commencing suits in Ecclesiastical Courts (*a*). But, though the Act now before us is a bad—I fear I must add, not an unfair—specimen of legislation, we cannot get rid of the words. Mr. *Manisty* would confine them to sales under any execution; but that is really varying the language of sect. 11, which must be enforced, though it goes far beyond the title and the preamble: it comprehends “any bill of sale,” and “any purchaser,” and is not even confined to purchasers, for it comprehends the assignees of bankrupts and insolvents. How then can we confine the enactment to sales under executions? I think, therefore, that the Judge was wrong in holding that the enactment was so confined. We are not bound to say that the plaintiff’s case could be made out; we say only that his case was not defeated by this objection. I cannot find that such a construction has been upheld in any previous case: *Ridgway v. Lord Strafford* (*b*) is not an authority on the construction of sect. 11; that section was not brought before the Court.

ERLE J. (*c*). I also am of opinion that this nonsuit was wrong. The question is, Whether sect. 11 of stat. 56 *G. 3. c. 50.* gives the plaintiff the rights for which he contends: that is, whether it prohibits the purchaser of a tenant’s crop of hay or straw on the farm from carrying it off the farm contrary to the terms of the lease. The words of the section are unqualified; they pro-

(*a*) 27 *G. 3. c. 44.* See *Free v. Burgoyne*, 5 *B. & C.* 400.

(*b*) 6 *Exch.* 404.

(*c*) *Wightman J.* had left the Court.

hibit any purchaser from using the hay, &c., otherwise than the seller could have used it. No doubt, if the section stood by itself, the prohibition must have been construed as absolute. But it is suggested that the statute professes to relate altogether to goods taken under execution; and Mr. *Manisty* goes through the preceding clauses which apply to such goods. Then he says that sect. 11 may be accounted for on this view; for that it is inserted for the purpose of preventing the purchaser of the stock, sold under an execution, from taking it off the farm, the preceding sections controlling only the acts of the sheriff. At first I thought there was weight in this argument: but I find that the supposed object is already secured by sect. 4; for the sheriff, by sect. 3, is to sell subject to the agreement between landlord and tenant or the custom; and then sect. 4 enables the landlord to recover damages, by action in the name of the sheriff, for the breach of the agreement with the sheriff. That, in effect, does prohibit the purchaser under an execution from carrying off the stock contrary to the terms of the holding. So that, unless we put upon sect. 11 the plain construction resulting from its language, we give it no operation. It prohibits the party who purchases farming stock, being on the land, from using it contrary to the terms of the letting. I may remark that this sort of purchase is peculiar; scarcely any one would make it without inquiring why the stock was sold on the land.

CROMPTON J. The case is clearly within the 11th section.

Appeal allowed.

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Friday,
April 28th.

JAMES O'TOOLE *against* EDWARD FRANCIS
BROWNE.

O., being then possessed of personalty only, by will executed in 1849, after bequests of money and chattels, added: "all the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects, of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto" *B. and T.*, executors of the will, "to hold to them, the said *B. and T.*, their executors, administrators and assigns," upon trust to "sell and dispose thereof," and call in and receive all debts, "and place the

moneys arising by such sale or disposal" upon Government or other security, receive the interest and dividends, and pay the same to testator's wife for life during her widowhood; and, if she died or married again, to apply the same, or a sufficient part thereof, to the maintenance of his children till they should come of age; and, when the youngest should come of age, to divide the said residue and the interest equally among the children.

After the execution of the will, *O.* purchased land.

Held that, under stat. 7 W. 4 & 1 Vict. c. 26. ss. 3., 24., such land passed by the residuary clause.

EJECTMENT for dwelling house and land in *Cheshire*. Defendant appeared as owner. By order of *Coleridge J.*, and by consent, the parties, without proceeding to trial, stated the facts for the opinion of this Court, upon a case which was substantially as follows.

John O'Toole, the testator after mentioned, made his will in writing, dated 10th *November* 1849, duly signed and attested as required to give validity to a testamentary disposition. By the will, he gave to a sister 500*L.*; to a brother his share in a ship; to *William Thompson*, an executor and trustee after mentioned, 200*L.*; to *Edward Francis Browne*, also an executor and trustee after mentioned, 100*L.* "Also I give and bequeath unto my beloved wife, *Eliza O'Toole*, all my plate, linen, china, household goods and furniture. All the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects, of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto the said *Edward Francis Browne*, of" &c., "and *William Thompson*, of" &c.:

“To hold to them, the said *E. F. Browne* and *W. Thompson*, their executors, administrators and assigns, upon this special trust and confidence nevertheless, that is to say, that they, my said trustees, or the survivor of them, do and shall, as soon as convenient after my death, sell and dispose thereof, and call in and receive all such debts, sum or sums of money, as shall be due or owing to me at the time of my death, and place the moneys arising by such sale or disposal upon Government or other good and sufficient security, in their own names, and in such manner as they shall think proper; and also in trust that they do and shall receive the interest and dividends thereof, from time to time, as the same shall become payable, and pay the same unto my beloved wife, *Eliza O'Toole*, during her lifetime, and as long as she remains my widow; and, in case my said wife either die or marry again, then in trust that they shall pay, apply and dispose of the same aforesaid interest and dividends of such moneys, or a sufficient part thereof, for and towards the sole maintenance, education and support of my children now living, or any other child or children that my said wife may be enceinte with at the time of my death, until my said children shall severally and respectively attain their said ages of twenty one years; and, when the youngest of my children shall have attained his or her age of twenty one years, in trust to pay, assign, transfer and convey all the said residue of my estate and effects, with the interest, dividends and produce thereof, equally unto and amongst all my said children then living.”

Direction that neither trustee should be liable for losses, nor answerable except for his own acts; and that the trustees should reimburse themselves the reasonable

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1854. costs, &c. of executing the will and trusts. "And,
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BROWNE. lastly, I do hereby nominate, constitute and appoint my
said trustees, the said *E. F. Browne* and *W. Thompson*,
executors of this my will and testament."

At the time of the execution of the will, the children of the testator then living were the plaintiff *James O'Toole*, *Mary Elizabeth O'Toole*, *Joseph O'Toole*, and *Margaret O'Toole*: and there is also another child of the testator now living, viz. *Mary Alice O'Toole*, who was born since the date of the will.

W. Thompson, one of the executors and trustees, died on 10th October 1852. Mr. *Browne*, the other executor and trustee, is the defendant hereto.

The testator died on 30th January 1853, without having revoked or altered his will, leaving the said *Eliza O'Toole*, his widow, and the several children above named.

The plaintiff, *James O'Toole*, is the eldest son and heir at law of the testator.

The will was duly proved by *Browne* on 15th February 1853; and he has accepted the trusts thereof.

The testator, at the time of the date and execution of his will, was not possessed of any real estate or interest in any real or chattel real property whatsoever: but, subsequently to the making of his will, he purchased in fee simple the plot of land sought to be recovered in the present action; and the same was conveyed to him by indenture bearing date 12th March 1850, and was thereby conveyed to the ordinary uses to bar dower, for the benefit of the testator. He afterwards erected a residence on the land, with necessary offices, &c., and resided therein down to and at the time of his death.

The question for the opinion of the Court is: 1854.
 Whether the plaintiff, the heir at law of the testator,
 is entitled to the premises, as not being comprised in
 the disposition made by the will. If the Court shall be
 of opinion that the plaintiff is so entitled, judgment is to
 be entered for him; otherwise for the defendant.

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The case was now argued (a).

C. Milward, for the plaintiff. The real property did not pass under the word "estate." That word, if the will contained nothing to lead to a contrary construction, might be held to pass realty; but the whole will indicates that the testator had no notion of bequeathing real property. [Lord *Campbell* C. J. Perhaps not, at the time of his executing the will. But he purchased the real property afterwards.] That brings the question to the effect of stat. 7 *W.* 4 & 1 *Vict.* c. 26. ss. 3., 24. Sect. 3 extends the power of devising to such "real and personal estate, as the testator may be entitled to at the time of death, notwithstanding that he may become entitled to the same subsequently to the execution of his will." Sect. 24 enacts that, as to both realty and personalty, the will shall be construed "to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." It will be contended, on the other side, that the word "estate," in a will executed after the testator had acquired the real property, would have passed such realty. But there is nothing in the statute to alter the inference as to the meaning of the words used; and the

(a) Before Lord *Campbell* C. J., *Wightman*, *Erle* and *Crompton* Js.

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question must still be what was passing in the testator's mind at the time he framed the will. [Lord *Campbell* C. J. Surely that cannot be the canon now.] The whole will must still be looked to. The word "estate" occurs together with words indicative only of personalty. In *Doe dem. Haw v. Earles* (a) it was held that the words "all my effects," and "other effects at this time in my possession, or that hereafter become my property," did not pass a remainder in fee, where the words were used in the will in connection with other words applicable merely to personal property. In *D'Almaine v. Moseley* (b) *Kindersley* V. C. held the particular words, in the will there under discussion, not to be sufficient to controul the effect of the words "residue of my estate and effects." The enactment in sect. 24 is controuled by the words "unless a contrary intention shall appear by the will." There is nothing here to shew that the testator intended to dispose of all that he possessed. [Lord *Campbell* C. J. He did dispose of all that he possessed at the time of his making the will.] He laid out money afterwards in the purchase of land. In *Hogan lessee of Wallis v. Jackson* (c), where the words "all the remainder and residue of all the effects both real and personal, which I shall die possessed of," were held to pass real property, they were preceded by the words "as to my worldly substance," upon which much stress was laid, as was pointed out, from the Bench, in *Sanderson v. Dobson* (d) in the Court of Common Pleas. Here the residue is that which

(a) 15 M. & W. 450. See errata to that volume.

(b) 1 *Drewr.* 629.

(c) 1 *Cowp.* 299., in K. B., reversing a judgment of K. B. in *Ireland*. Judgment of K. B. in *England* affirmed in Dom. Proc., *Jackson v. Hogan*, 3 *Bro. P. C.* 388 (2d ed.).

(d) 7 *Com. B.* 81. 87.

remains after certain personalty only is disposed of, a circumstance which, in *Marhant v. Twisden* (a), was considered to limit the words "residue of my estate and chattels, real and personal," to personalty; though possibly that case goes beyond the principles recognized in more modern authorities. Still the words which are associated with the words in question are to be looked to. It is to be observed, further, that here the word "devise," which properly appertains to realty, does not occur: the words are "give and bequeath," which are correctly applicable to personalty only. The gift is to the executors, habendum to them, their "executors, administrators and assigns;" and this, though not a circumstance sufficient to justify a contravention of an intent clearly appearing elsewhere, is at any rate of importance as an element in ascertaining the intent. [Lord Campbell C. J. But observe: the executors are to sell; and there is no beneficial interest given to them. *Wightman J.* Must we not understand the testator as intending to dispose of all he should have at the time of his death?] All of a certain character. [*Wightman J.* Suppose he had used the words "all the estate and effects I shall be possessed of at the time of my death:" and does not the statute incorporate the effect of such words?] In *Doe dem. Bunny v. Rout* (b) the bequest was, to the sole executrix, of "all my stock in trade, household goods, wearing apparel, ready moneys, securities for money, and every other thing, my property, of what nature or kind soever, to and for her proper use and disposal," subject to debts and funeral expenses: this was held not to pass land. The judgment there reviews many of the preceding cases;

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but it does not notice a very important one, *Doe dem. Spearing v. Buckner* (a), where the introductory words of the bequest were "as to my estate and effects both real and personal;" and then, after some bequests of personalty, the will proceeded thus: "and also all the rest residue and remainder of my estate and effects of any and what nature or kind soever or wheresoever, I give and bequeath the same" to C. B. and J. R., "their executors or administrators in trust and that they shall from time to time add the interest thereof to the principal, so as to accumulate" &c., going on to direct how "the said residue" should be paid: and this was held not sufficient to disinherit the heir. *Woollam v. Kenworthy* (b) is another instance of the effect of the word "estate" being controuled by other words indicating an intention to confine the bequest to personalty. In 1 *Jarman On Wills*, chapter xxii., p. 657 &c., the cases are collected. *Bebb v. Penoyre* (c) is one of the strongest, because there the words "rest and residue" were preceded by a devise of certain land, and yet were confined to personalty. The authority most adverse to the heir at law is *Doe dem. Evans v. Evans* (d). There a testator, holding land to him and his heirs pur auter vie, after bequeathing certain sums of money, went on: "Also I give, bequeath, and devise unto my beloved wife, *Ann Evans*, all my money, securities for money, goods, chattels, and estate and effects, of what nature or kind soever, and wheresoever the same may or shall be at the time of my death:" and the wife was made sole executrix. It was held that the land passed to her. But the judgment is very short, and can hardly be

(a) 6 T. R. 610.

(c) 11 East, 160.

(b) 9 Ves. 137.

(d) 9 A. & E. 719.

considered as satisfactory: it merely relies on two cases, and on the circumstance that the words which accompanied "estate" might be satisfied by reference to the personal property. The will discussed in the case of *Sanderson v. Dobson* was before the Court of Exchequer (*a*), the Rolls (Lord *Langdale*) (*b*) and, lastly, the Court of Common Pleas (*c*). The bequest there was of "all the rest of my household furniture, books," &c., "goods, chattels, estate, and effects of what nature or kind soever," to the executors, their executors, administrators and assigns, in trust "to sell and dispose of the same," and apply the money in payment of debts and a legacy after mentioned, and pay the overplus to testator's sisters. The Court of Exchequer held that no land passed under the residuary clauses; but the Court of Common Pleas held that land did pass, probably on the authority of *The Mayor of Hamilton v. Hodsdon* (*d*). But, in the case last mentioned, there was not enough to controul the words "all the remainder of my estate."

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Mellish, contra. The word "estate" *primâ facie* includes land. [Lord *Campbell* C. J. You need not argue that point.] Then the burthen of argument is on the party seeking to controul the effect of the word. The leading case now must be considered to be *The Mayor of Hamilton v. Hodsdon* (*d*). There the early cases, upon which most reliance has been placed on the

(*a*) *Sanderson v. Dobson*, 1 *Exch.* 141.

(*b*) *Sanderson v. Dobson*, 10 *Beav.* 478.

(*c*) *Sanderson v. Dobson*, 7 *Com. B.* 81.

(*d*) 6 *Moore's P. C. C.* 76.

1854. other side, are treated as no longer law. Nothing in this will suggests an intention which can controul the expression. The scheme of the will is very simple. First there are some pecuniary legacies; and then follows the devise in question, which is in the most general terms; and the trusts are for sale, and an investment of the produce for the benefit of the wife and children. That trust is applicable indifferently to realty and personalty: and, as the money is finally to be divided equally among the children, the inference is that there was no intention to leave any real estate undisposed of. It is argued that the word "estate" occurs in juxta-position with words relating to personalty: but the fair interpretation is that the word "estate" was added in order to make that a general devise which otherwise might have been restricted to personalty; *Tilley v. Simpson* (a), *Jongsma v. Jongsma* (b), which are the two cases acted on in *Doe dem. Evans v. Evans* (c), where this principle was the ground of the decision. [Lord Campbell C. J. Certainly that ground of decision is emphatically disclosed in the judgment.] The judgment is, it is true, brief; but the reason of that is that the principle was supposed to be incontrovertibly settled. There is more weight in the circumstance of the habendum here being to the executors, their executors and administrators. [Lord Campbell C. J. That would be a very strong argument against you, if the interest devised were beneficial: but here it is only a devise in trust for sale.] That is the answer.

(a) Note (b) to *Fletcher v. Smiton*, 2 T. R. 659.

(b) 1 Cox, 362.

(c) 9 A. & E. 719.

Even where the interest is beneficial, such an habendum cannot controul plain words; *William dem. Hughes v. Thomas* (a). The circumstance is not very strong, nor is it altogether to be rejected in construing the will; *Doe dem. Hurrell v. Hurrell* (b), *In re King's Mortgage* (c). So in *Stokes v. Salomons* (d) words indicating an intention that the property devised should be treated as personalty were held not to controul the word "estate and effects." But, further, it may be argued that the Legislature meant, by the provisions of stat. 7 W. 4 & 1 Vict. c. 26., to do away with the distinction between personalty and realty. Before that statute, after acquired personalty passed by will: now sects. 3 and 24 put after acquired realty on the same footing. *D'Almaine v. Moseley* (e) resembles this case very closely; and the judgment there furnishes an answer to most of the argument on the other side. There was in that case a distinction between the different trusts, which is not to be found here, and which might to a certain extent have suggested an argument that the realty and personalty were not comprehended in the same general intention. In *Saumarez v. Saumarez* (g) realty was held to pass by the words "residue of the property which I may leave at my death:" and the Lord Chancellor (Lord Cottenham) said, in reference to expressions and directions in the will, which had been insisted upon as negating the intention to pass the realty: "In considering gifts of residue, whether of real or of personal estate, it is not necessary to ascertain whether the testator had any particular property in con-

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(a) 12 East, 141.

(c) 5 De G. & S. 644.

(e) 1 Drewr. 629.

(b) 5 B. & Ald. 18.

(d) 9 Hare, 75.

(g) 4 Myl. & C 331.

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temptation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense." The only modern case adverse to the executors is the decision in the Court of Exchequer of *Sanderson v. Dobson* (a). The ground of decision there was that the whole of the personalty could not be included under the word, and therefore, a fortiori, not the realty. That reason is inapplicable in the present case. Further, Lord *Langdale* (b) pointed out that the attention of the Court of Exchequer had not been drawn to the words of exception; and, upon the case afterwards going to the Court of Common Pleas, the decision was the other way (c).

C. Milward, in reply. In the cases relied upon on the other side, as to the word "estate," it is the leading word, and not, as here, a word used indiscriminately with words signifying personalty. In *Saumarez v. Saumarez* (d) the words were "residue of the property."

Cur. adv. vult.

(a) 1 *Exch.* 141.

(b) *Sanderson v. Dobson*, 10 *Beav.* 478. 483.

(c) *Sanderson v. Dobson*, 7 *Com. B.* 81.

(d) 4 *Myl. & C.* 331.

Lord CAMPBELL C. J., on a later day in this Term (May 3d), delivered the judgment of the Court. 1854.

We are of opinion that, under the Wills Act, 7 *W.* 4 & 1 *Vict. c.* 26., the defendant is entitled to our judgment.

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We consider it right to observe, however, that his counsel in the argument attempted to ascribe an operation to this Act which we do not think it was intended to have, in contending that its policy was to destroy the distinction between real and personal property. Looking to the language employed by the Legislature, we think that, unless where the statute contains an express enactment to alter the effect of words in a will, they are still to have exactly the same operation as before the Act passed.

In this case, we are to regard only the 24th section of the Act, which enacts "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." We are, therefore, to consider what would be the proper construction of the will of *John O'Toole*, assuming it to be executed immediately before his death, and whether, regard being had to the time when it was executed, any thing appears in the will shewing that by this construction the intention of the testator would be contravened.

Before the Wills' Act passed, if the testator, at the time of making his will, had been seized in fee simple of the land sought to be recovered in this ejectment, would the land have passed by the will? We are of opinion that it would. The rule is well settled by *Doe*

1854. *dem. Evans v. Evans (a), The Mayor of Hamilton v. Hodsdon (b)*, and a long train of decisions, which it is unnecessary to enumerate, that the word "estate" in a will is sufficient to carry real as well as personal estate, and that this force is to be given to it unless something appears upon the will to shew that it was used in a less extensive signification. Here the testator, after leaving several legacies, pecuniary and specific, uses these words: "all the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto the said *Edward Francis Browne*" "and *William Thompson*," "to hold to them," "their executors, administrators and assigns, upon this special trust and confidence" &c.; the trusts being all such as would be applicable to real as well as personal estate. Although there be no introductory words intimating expressly an intention to dispose of the whole of his property real and personal, is there any thing to shew that he meant to die intestate as to real estate, if he had any?

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Reliance was placed upon the absence of the word "devise," which is technically applicable to real estate: but the words "give and bequeath" are quite sufficient.

More stress was placed upon the residuary clause beginning the enumeration of the property to be disposed of with "goods, chattels, stock in trade;" the argument being that the general words which follow must be confined to property ejusdem generis. But, according to the current of authorities, the effect of the word "estate" is not restrained merely by this collocation;

(a) 9 A. & E. 719.

(b) 6 Moore's P. C. C. 76.

and any presumption that the general words are used in a restricted sense is rebutted by the words which follow, "of *what nature or kind soever*, not hereinbefore given or bequeathed."

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The only other circumstance relied upon for the heir at law was, that the limitation is to *Browne* and *Thompson*, "their executors, administrators and assigns." Some weight might have been given to this objection, if the intention had been that *Browne* and *Thompson* were to take a beneficial interest in the subject matter left to them; for real estate could not by such a limitation vest in executors. But *Browne* and *Thompson* are mere trustees to sell and divide the proceeds among the different objects of the testator's bounty: and, to empower them to do this with respect to real estate, the words of the will are amply sufficient.

It may be further observed that the trusts of the will indicate an intention that no preference was to be given to the testator's eldest son, and that all his children were to be put upon equal footing in the division of his property. Supposing that he had been seized of real estate when he made his will, there appear to be words in the will indicating a clear intention that his eldest son should not inherit it, but should only take an equal portion of the proceeds with the other children.

Out of respect to the Court of Exchequer, we ought to say that we have not overlooked their decision in *Sanderson v. Dobson* (a). But the Lord Chief Baron, in delivering the judgment of the Court, says: "The ground on which we mainly rely is, that from the context it appears certain that the word 'estate' was not

(a) 1 Exch. 141.

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meant to include all the personal estate, and therefore the principle on which the word is held to include real property, namely, the absolute generality of the expression, fails." That ratio decidendi would not apply in the present case, in which the words of the will are admitted to be sufficient to carry the whole of the personalty. At any rate, the effect of that decision must be considered as neutralized by the subsequent unanimous decision of the Court of Common Pleas on the same will (*a*), holding that the real estate passed by it.

Such being the right construction of the will, supposing the will to have been executed immediately before the death of the testator, nothing has been pointed out to us, or can be found as appearing by the will, to shew a contrary intention, regard being had to the fact that in truth the will was executed on the 10th of *November* 1849, when the testator had not purchased the land sought to be recovered.

We are therefore bound to give judgment for the defendant.

Judgment for defendant.

(*a*) *Sanderson v. Dobson*, 7 Com. B. 81.

1851.

The QUEEN *against* the Inhabitants of BUCKNELL. *Saturday, April 29th.*

ON appeal against an order of two justices for the removal of *Richard Watts* and *Elizabeth* his wife, with their three children, from the parish of *Knighton* in *Radnorshire*, to the parish of *Bucknell* in *Shropshire*, the Sessions confirmed the order, subject to a case.

The case set out the order of removal. The only part, the words of which are material to the points discussed, was the recital of the complaint that the paupers, being inhabiting in the parish of *Knighton*, "have become and are now actually chargeable thereto, and now receiving relief therefrom, not having resided in the said parish for five years next before the application for this warrant of removal, and not having gained a legal settlement there, nor having produced any certificate acknowledging them to be settled elsewhere, and not having become chargeable thereto in respect of relief made necessary by sickness or accident. We upon due proof of the premises do adjudge the same to be true." The case then set out a copy of the notice of chargeability and grounds of removal, a copy of the examinations, a copy of the notice of appeal, and a copy of the grounds of appeal. Those parts of those documents material to the questions are stated sufficiently in the subsequent part of the case, which was as follows.

Two justices made an order for the removal of a pauper, and in the warrant stated that the pauper had not "become chargeable" to the removing parish "in respect of relief made necessary by sickness or accident." On appeal, the Sessions confirmed the order, subject to a case stating (amongst other things) that the pauper was afflicted with incurable blindness, which was the original and continuing cause of his chargeability.

Held: that blindness was sickness within the meaning of stat. 9 & 10 Vict. c. 66. s. 4.; and that, the justices not having stated in the warrant that they were satisfied that the sickness would produce permanent disability, the warrant was bad. And this Court quashed the order accordingly.

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“The statement in writing of the grounds of removal, duly served upon the appellants with a notice of chargeability and a copy of the said order appealed against, in so far as the said statement related to the ground of settlement relied upon by the respondents, stated as follows. ‘That the said pauper *Richard Watts* has gained a settlement in your parish of *Bucknell*, by one of the means stated in his examination taken by the removing magistrates, and that his settlement in your parish of *Bucknell*, by one of such means or otherwise, has been acknowledged, since the year 1847, by relief given to himself, his wife and children by your said parish of *Bucknell*, whilst he and they have been residing in that parish, and also in the parish of *Knighton* since the month of *May* 1851.’ The examination referred to in the grounds of removal, or a copy of it, was not sent with the order and grounds of removal to the appellants; but a copy of the examination was applied for, and sent to and received by the appellants on the 29th day of *April* 1853. The examination stated that the said *Richard Watts* was 48 years of age, and was born, as he had heard and believed, at *Watts’s* old house in the said parish of *Bucknell* in the county of *Salop*. It also stated a hiring and service, in the said parish of *Bucknell*, by the said *Richard Watts* when about 15 years of age, so as, if proved, to confer a settlement; and it also stated certain relief given by the appellants to the pauper, whilst he was residing in the respondent’s parish.

“The respondents at the hearing proved a birth settlement of the pauper *Richard Watts* in the appellant parish: and thereupon it was objected, on the part of the appellants, that, as the statement in writing of the grounds of removal did not in any way set forth the

settlement relied upon, as required by stat. 11 & 12 *Vict. c. 31.* sects. 1 and 2, the respondents could not legally go into evidence of such settlement. The Court of Quarter Sessions was of opinion that the statement of the grounds of removal was to be read as incorporating the examination of the said *Richard Watts*: and the examination was read accordingly.

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“The respondents then proved that, since the month of *May* 1851, and down to the 30th *December* 1852, the said *Richard Watts* had from time to time received relief from the appellant parish, the said *Richard Watts* during all the said time being resident out of the appellant parish, and in the respondent parish; and the respondents relied upon this as evidence of the admission of the pauper's settlement in the appellant parish. This was the case for the respondents.

“The appellants in answer claimed to be allowed to prove that the said relief given by their parish had been given in error, and under a mistaken belief as to the settlement of the said *Richard Watts*, and that the said *Richard Watts* had not gained a birth settlement in their parish, the father of the said *Richard Watts* having, at the time of the birth of the said *Richard Watts*, acquired a settlement in the parish of *Brampton Brian* in the county of *Hereford*, by reason of a hiring and service. The respondents objected to the appellants giving such evidence, as the statement of grounds of appeal, served upon the respondents, did not mention such settlement by hiring and service as one of the grounds of appeal. The appellants rested their right to give such evidence on their 4th ground of appeal, which was as follows: ‘That, if any relief has been given to the said paupers by our said parish, it was given in error, and under a

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mistaken belief as to the place of settlement of the said paupers, and that the said paupers have never acquired a settlement, and are not settled in our said parish.' The Court of Quarter Sessions was of opinion that the objection was valid, and refused to allow the appellants to give such evidence.

"The appellants proved that the pauper had been afflicted with incurable blindness, which was the original and continuing cause of his chargeability since the month of *August* 1847; and contended that the blindness of the said *Richard Watts* was to be considered 'sickness or accident' within stat. 9 & 10 *Vict. c. 66. s. 4.*; and therefore that the said order ought to have stated that the justices, granting the same, were satisfied that such sickness or accident would produce permanent disability.

"The respondents on the other hand contended that, as the order negatived the chargeability to have been caused from sickness or accident, and as there was no proof that any such sickness or accident existed, further than the incurable blindness of the pauper since 1847, the appellant's objection could not be sustained.

"The Court of Quarter Sessions decided against the objection.

"If the Court of Queen's Bench shall be of opinion that the respondents ought not to have been allowed to go into the evidence given, either of the birth settlement of the pauper in the appellant parish, or of the settlement by relief given by the appellants, or that the blindness of the said *Richard Watts* was sickness or accident within stat. 9 & 10 *Vict. c. 66. s. 4.*, and the order appealed against therefore bad for omitting to state that the justices granting the same were satisfied that

such sickness or accident would produce permanent disability; then the said order and the order of sessions confirming the same are to be quashed: but, if otherwise, then the said orders are to be confirmed.

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“And, if the Court shall be of opinion that the appellants, under their grounds of appeal, were entitled to go into evidence of the settlement of the pauper’s father in a third parish to shew that the relief proved to have been given by their parish had been given in error and under a mistaken belief as to the settlement of the said *Richard Watts*, then the appeal is to be sent back to the Sessions in order that such evidence may be heard and determined upon: but, if otherwise, then the said orders are to be confirmed.”

The case was now argued (a).

Skinner, in support of the order of Sessions. The first point arises on the sufficiency of the grounds of removal, sent with the notice of chargeability pursuant to stat. 11 & 12 *Vict. c. 31. s. 2.*; and the objection made is that these grounds refer to the examinations. There is no reason why they should not incorporate the examinations; but, in the present case, the grounds of removal also state relief by the appellant parish, which is a sufficient *primâ facie* case. Then the objection is made that the order is bad for not complying with stat. 9 & 10 *Vict. c. 66. s. 4.*, which enacts “that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that

(a) Before Lord *Campbell* C. J., and *Wightman* J. *Erle* and *Crompton* Js. were in the Court of Criminal Appeal.

1954. the sickness or accident will produce permanent disability." Now this objection is not raised in fact: the justices, by the wording of their order, shew that they decided that the relief was not made necessary by sickness; and that might well be, for blindness is not necessarily sickness; nor does it necessarily incapacitate a man from earning his livelihood.

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Scotland, contra. The very object of stat. 11 & 12 *Vict. c. 31. ss. 1., 2.,* was to substitute the notice of grounds of removal for the examinations. [Lord Campbell C. J. But may they not be incorporated? *Verba relata in esse videntur.*] That might have been, if the examination had been sent along with the grounds of removal; but it was not. [Wightman J. If the respondents were entitled to go into proof of the relief given by the appellant parish, it is sufficient to make us answer the first question submitted to us in their favour.] Then the order is bad, as it does not state that the justices were satisfied that the disability would be permanent. The Sessions find as a fact "that incurable blindness" "was the original and continuing cause" of the pauper's chargeability: but they cannot find that the justices who made the order of removal were then satisfied that the blindness was incurable, or the disability permanent. The justices in the warrant say the chargeability was not occasioned by sickness. Supposing them to be ignorant that the pauper had been sick: still, if such was the fact, the warrant is bad; *Regina v. Prior's Hardwick (a)*. Then, is not blindness sickness within the meaning of stat. 9 & 10 *Vict. c. 66. s. 4.*?

(a) 12 Q. B. 168.

The object of the Act was to protect persons incapacitated by any disease, whether chronic or not, from being removed, unless the disease was likely to produce permanent disability. Lastly, the appellants ought to have been permitted to give in evidence anything that could prove their fourth ground of appeal, and therefore to shew that the relief was given in error. And, to prove that, they were entitled to shew that in fact the pauper was settled elsewhere.

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Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this term (*May 3*), delivered judgment.

The first point arising in this case we clearly think ought to be decided in favour of the respondents. They having stated on the face of their grounds of removal (without referring to the examination of the pauper), as one of the grounds, "relief given to the pauper by the appellant parish while residing in the respondent parish," they were at liberty to make a *prima facie* case of a settlement in the appellant parish, by proving this relief, even if not entitled to prove a birth settlement in the appellant parish; and the proof of the birth settlement, if improperly admitted, did not prejudice the respondents.

We further think that the proof of this birth settlement was properly admitted to disprove the allegation of the appellants that the relief had been given by mistake.

But the second and more important point we think must be determined in favour of the appellants. This turns on the 4th section of stat. 9 & 10 *Vict. c. 66.*, which enacts "that no warrant shall be granted for the removal of any person becoming chargeable in respect of relief

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The QUEEN justices granting the warrant shall state in such warrant
v. that they are satisfied that the sickness or accident will
Inhabitants of produce permanent disability.”
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In the present case, the order of removal negatives the fact of the paupers “having become chargeable” “in respect of relief made necessary by sickness or accident,” and, of course, contains no statement “that the sickness or accident will produce permanent disability.” The want of this statement being one of the grounds of appeal, the appellants proved that the pauper, who was the father of the family removed, “had been afflicted with incurable blindness, which was the original and continuing cause of his chargeability since the month of August 1847.”

The question arises, Whether this be a case in which the pauper is to be considered a person becoming chargeable in respect of relief made necessary by sickness? In *Regina v. Priors Hardwick (a) Patteson J.* says: “The object of this enactment was to protect the pauper: that a person becoming chargeable by a merely temporary sickness should not be removed.” And the Court held that an order of removal was bad for omitting this statement, although the fact of sickness was never brought before the removing justices. The cause of chargeability being a fact to be inquired into on appeal, we are to say whether in this case the proof was not sufficient that the chargeability did arise from sickness. There would probably have been no difficulty in coming to the conclusion that the sickness would produce permanent disability: and we do not understand why advantage was

(a) 12 Q. B. 168.

not taken of the 6th section of stat. 11 & 12 *Vict. c. 31.* by having the order of removal amended at the Sessions by supplying the omission. But we are called upon to say whether, upon the evidence at the Sessions, the objection to the order ought to have been sustained. And we are of opinion that *incurable blindness is sickness* within the meaning of stat. 9 & 10 *Vict. c. 66. s. 4.* It seems impossible to give any definition of sickness which will not include blindness. A disease which is incurable or mortal is not the less sickness. Blindness may be incurable, without necessarily producing permanent disability to earn a livelihood; and a man, though incurably blind, might be oppressively removed contrary to the intentions of the statute. There can be little doubt that in this case the blindness did produce permanent disability; but the order does not say so; and therefore we think that it is bad. Consequently the order of removal, and the order of Sessions confirming it, must be quashed; and it becomes unnecessary to consider the validity of the last objection of the appellants, that they were shut out from proving that the pauper had a derivative settlement in a third parish.

Rule absolute for quashing order of justices
and order of sessions.

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The QUEEN *against* the Inhabitants of the Parish
of EAST STONEHOUSE.

The wife and children of a private marine had resided five years in the parish of *S.* The husband had not so resided. The husband being absent on Her Majesty's service, the wife and children were removed to the parish of *C.* On appeal, the Sessions quashed the order, subject to a case stating the above facts, on the ground that the wife and children were irremovable.

Held: that the wife and children might be removed notwithstanding stat. 9 & 10 *Vict. c. 66.* and stat. 11 & 12 *Vict. c. 111.*, though the husband, if present, could not have been removed in consequence of his being a marine; inasmuch as the proviso in that latter statute only prohibits the removal of the wife or children of a person who had acquired the status of irremovability under stat. 9 & 10 *Vict. c. 66.*

ON appeal to the Quarter Sessions for *Devonshire*, against an order of two justices, dated 29th *July* 1853, for the removal of *Jane Warne*, the wife of *George Warne*, a private in the Royal Marines, then absent from her, and her five infant children, from the parish of *East Stonehouse* in *Devonshire* to the parish of *Charles the Martyr* in the borough of *Plymouth*, the Sessions quashed the order, subject to the following case.

The said *George Warne*, the husband of the said *Jane Warne* and the father of her said children, enlisted as a private in the Royal Marines in *September* 1841, and has, ever since that time, continued in Her Majesty's service as a private of marines. He married his said wife in *December* 1846, at *Stonehouse*, where his wife then resided, and where she has ever since resided; and her said children have resided there with her since their respective births. At different times after his marriage, and down to 27th *January* 1848, the said *George Warne*, still being a marine, was quartered in barracks in *Stonehouse*. From 27th *January* 1848 to 31st *December* 1851, the said *George Warne* was serving on board the guard ships in the harbour of *Plymouth*, and out of the parish

of *Stonehouse*; and, during that time, he frequently slept with his wife in *Stonehouse*. The Court of Quarter Sessions were of opinion that the paupers were respectively irremovable.

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If the Court of Queen's Bench shall be of opinion that the said paupers were irremovable at the time of the date of the said order, the same is to be and remain quashed. But, if the said Court shall be of opinion that they were removable, the same is to be and stand confirmed.

Rowe, in support of the order of Sessions. Stat. 9 & 10 *Vict. c. 66. s. 1.* enacts that no person shall be removed from any parish in which such person shall have resided for five years next before the application for the warrant. Had the enactment stopped there, the woman in the present case would have been irremovable: but the section contains a proviso: "that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable." This proviso was construed as meaning that, when the husband, if present, would be removable, but was absent, the wife and children might be removed; *Regina v. St. Ebbe's (a)*. Then stat. 11 & 12 *Vict. c. 111.* recites stat. 9 & 10 *Vict. c. 66. s. 1.*, repeals the proviso, and enacts, instead of it: "that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place

(a) 12 Q. B. 137.

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from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act.” The husband here, being a marine, could not have been removed from this parish.

Karslake, contra. There had been no irremoveability acquired by the husband under stat. 9 & 10 *Vict. c. 66.*; for he had never resided in the parish for five years in it. The proviso, being on an enactment, must be construed with reference to that enactment; and, that being so, irremoveability in the proviso means the status of irremoveability from a particular place or parish, acquired under the enactment. It is true that, so long as the husband continues in the Queen’s service, he cannot be removed from any place; and it is also true that, if husband and wife be living together, you may not remove the wife alone so as to break the consortium. But that objection does not arise here; as the husband is absent. It would be clear, if it stood on the proviso in stat. 8 & 9 *Vict. c. 66.*, that “not removeable” meant having acquired the status under the Act: but the language of the amended proviso in stat. 11 & 12 *Vict. c. 111.* puts it beyond all doubt.

LORD CAMPBELL C. J. I think it is clear that the meaning of the proviso is, that the wife and children shall not be removeable when the husband has acquired the status of irremoveability under the Act. Here it can in no sense be said that the husband would not be removeable by reason of any provision in the Act.

WIGHTMAN J. The first proviso is so worded as to leave it open to doubt whether it might not apply to irremovability on any ground; but the proviso in the second Act puts an end to all doubt (*a*).
 Order of Sessions quashed.

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(*a*) *Erle J.* and *Crompton J.* were on this morning in the Court of Criminal Appeal.

The QUEEN *against* The Trustees and Commissioners of the SOUTH SHIELDS Turnpike Roads.

Saturday,
 April 29th.

ON appeal against an order of three justices of the peace for the county of *Durham* for the payment of 13*l.* 15*s.*, being a portion of a rate to be levied in the township of *East Bolton*, in the county of *Durham*, for the repairs of the *South Shields* turnpike roads, to be wholly expended on that part of the turnpike within the said township, the Sessions quashed the order, subject to a case. The case set out the order appealed against; but nothing turned upon its form. The case then proceeded to state that, under and by virtue of stat. 7 *G.* 4.

A turnpike Act, 7 *G.* 4. c. xvii., appropriated the turnpike funds in the first place to the repairs of the road, and afterwards to the payment of interest on the moneys borrowed on the security of the road. The trustees, after the passing of stat. 4 & 5 *Vict.* c. 59.,

applied the funds in paying arrears of interest on the borrowed money, accrued due in previous years: in consequence, the funds were insufficient to repair the road. Justices, at a special session for the highways, made an order, under stat. 4 & 5 *Vict.* c. 59., on a parish to contribute to the repair of the part of the turnpike road within that parish. On appeal, the Sessions quashed the order, subject to a case, in which it was found that, if the payment of arrears of interest was a legal appropriation of the funds, the order of the justices was right, but otherwise not.

Held: that the order of appropriation in the local Act was not altered by stat. 4 & 5 *Vict.* c. 59.; and, consequently, that the payment by the trustees was improper. That the justices had discretionary power to make such an order, if expedient, notwithstanding that the insufficiency was occasioned by the misappropriation of the funds; but that the Quarter Sessions exercised a sound discretion in reviewing their decision, and quashing the order under the circumstances.

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c. xvii. (a), certain then existing highways were widened, altered and amended, and became the turnpike roads known by the name of the "*South Shields* turnpike roads;" the cost of doing which and obtaining the Act was 4,168*l.*; which said sum was subscribed and advanced for the purposes of the said Act, and borrowed on the credit of the said Act and of the tolls to be levied thereunder. Part of this said sum of 4,168*l.* has been repaid out of tolls, leaving due in the year 1842 the principal sum of 3,300*l.*, which is still due and owing to those who so advanced it, or their assigns. Interest was paid on the said principal sum of 3,300*l.*, at the rate of 4*l.* per cent., from the year 1847 to 1850. In 1846, 3*l.* per cent. was paid. For five years prior to 1846 no interest whatever was paid. In 1840 and the four previous years 3*l.* per cent. interest was paid. In 1835 no interest was paid. In 1834 and 1833, 3*l.* per cent was paid. Prior to 1833 no interest was paid. So that, during the time since the passing of the Act, an arrear of interest became due to the creditors, which in *October* 1852, and at the time of making the order above set out, amounted to 2,308*l.* During each of the years 1851 and 1852, the trustees paid to the creditors of the road interest on the said sum of 3,300*l.* at 5*l.* per cent., which amounted to the sum of 165*l.* They also paid to them a further sum of 165*l.* in each of the said years, in reduction of the arrears of interest, due as before stated, which was entered in the statement filed with the clerk of the

(a) Local and personal, public: "For making and maintaining a turnpike road from *South Shields* to *White Mere Pool*, and from thence to join the *Durham* and *Newcastle* turnpike road at *Vigo Lane*, with a branch from *Jarrow Slake* to *East Boldon*, all in the county of *Durham*."

peace, in pursuance of the statute in that behalf made, as "Sinking fund applicable to the payment of arrears of interest," as by reference to the said statement (a copy of which forms part of this case) will appear (*a*): but in fact there was no sinking fund for the payment of the principal; nor was any sum set apart for or applied to that purpose.

The counsel for the appellants drew the attention of the Bench to sect. 4 of stat. 13 & 14 *Vict. c. 79*.

The Sessions quashed the order and found: That the funds would have been sufficient for the payment of annual interest, for the repairs of the road, and other current expenses, if a sum had not been applied towards payment of arrears of interest. That, if the trustees of the road had not by law the power to apply the sum aforesaid to the payment of arrears of interest, the justices were wrong in making the order. If the trustees had the power by law of so applying the said sum, then that the justices were right in making the said order.

If the Court of Queen's Bench should be of opinion that the trustees of the road had not the power by law to make the payments aforesaid, the order of Sessions is to be confirmed. If the Court of Queen's Bench should be of opinion that the trustees had such power, then the order of Sessions is to be quashed and the original order of justices is to be confirmed.

A copy of stat. 7 *G. 4. c. xvii.* accompanied the case. The only part which it is necessary to state is sect. 17, which enacts that the moneys raised under that Act shall be applied to making the roads; "and the remainder (if any) of all such moneys, and all moneys which shall

(*a*) Nothing turned upon the statement, the material part of which appeared in the body of the case.

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arise or be received from the tolls by this Act granted or otherwise, shall from time to time be applied in amending and keeping in repair the roads to be made turnpike by virtue of this Act, and the toll gates and toll houses and in otherwise putting this act into execution, and then in keeping down the interest of the principal monies subscribed or advanced, or to be subscribed and advanced for the purposes of this Act, and which may be borrowed on the credit thereof; and lastly, in repaying such principal moneys, and all moneys which shall be borrowed for the purposes of this Act, or on the credit thereof."

The case was now argued (*a*).

A. F. O. Liddell and *J. R. Davison*, in support of the order of Sessions. Stat. 7 *G. 4. c. xvii. s. 17.* clearly makes the repairs of the roads a purpose which is to take priority of the payment of interest, either annual or in arrear. But it will be said that stat. 4 & 5 *Vict. c. 59. s. 1.* has the effect of altering the order of appropriation; and *Regina v. White* (*b*) will be relied on as a decision that such is the construction of the Act. That case was decided on stat. 2 & 3 *Vict. c. 81. s. 1.*, which was the same as stat. 4 & 5 *Vict. c. 59. s. 1. (c)*. But the decision is,

(*a*) Before Lord Campbell C. J., Erle and Crompton Js. *Wightman J.* had gone to Chambers.

(*b*) 4 *Q. B.* 101.

(*c*) Stat. 4 & 5 *Vict. c. 59.* has been prolonged by successive annual Acts, of which the last is stat. 16 & 17 *Vict. c. 135.*, and is still in force. The first section is as follows. "Whereas an Act was passed," 5 & 6 *W. 4. c. 50.*, "whereby divers statutes passed in the reign of his late Majesty king *George* the third, relating to the performance of statute duty, were repealed, and statute duty was thereby altogether abolished; And whereas the revenues of some turnpike roads are so unequal to the charge and maintenance of such roads, after paying the interest

only, that the justices have power, when the funds are insufficient, to make such an order if they think it necessary or expedient, even though the insufficiency of the trust fund may have arisen from a misapplication of the funds by the trustees. But the Sessions on appeal may quash the order if they think it not expedient to make one: and in the present case the Sessions find that, if this was a misappropriation of the funds, it was not expedient to make this order. Stat. 4 & 5 *Vict. c. 59*. recites that the revenues of some turnpike roads are "unequal to the charge and maintenance of such roads, after paying the interest and principal of the sums due upon mortgage of the tolls thereof." It may be that in many

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and principal of the sums due upon mortgage of the tolls thereof, when deprived of the aid heretofore derived from statute duty, that it is necessary that some additional provision be made for such roads, for a limited period" &c. "Be it therefore enacted" "that it shall be lawful for the justices at any special sessions for the highways holden after the passing of this Act, upon information exhibited before them by the clerk or treasurer of any turnpike trust that the funds of the said trust are insufficient for the repairs of the turnpike roads within any parish, notice in writing of such intended information having been previously given on the part of such clerk or treasurer to the parish surveyor twenty one days at least before such special sessions, to examine the state of the revenues and debts of such turnpike trusts, and to inquire into the state and condition of the repairs of the roads within the same, and also to ascertain the length of the roads, including turnpike roads, within such parish, and how much of such road is turnpike road, and if after such examination it shall appear to the said justices necessary or expedient, for the purposes of any turnpike road, so to do, then to adjudge and order what portion, if any, of the rate or assessment levied or to be levied by virtue of the said recited Act shall be paid by the said parish surveyor, and at what time or times, to the said commissioners or trustees, or to their treasurer or other officers appointed by them on that behalf, such money to be wholly laid out in the actual repairs of such part of such turnpike road as lies within the parish from which it was received."

Sect. 3 gives an appeal to Quarter Sessions. Sect. 4 enacts that "parish" shall be taken to mean (inter alia) "township."

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local Acts the payment of principal and interest is to take priority of the repairs: but this recital cannot have the effect of enacting that in all turnpike trusts the order of appropriation shall be such as is recited, and that all statutes to the contrary shall be repealed. There are no words in the enacting part of stat. 4 & 5 *Vict. c. 59.* to indicate such an intention. In *Regina v. White* (a) Lord *Denman* does, it is true, throw out a suggestion that the order of appropriation might be changed; but the decision is pointedly confined to the power of the justices to make the order under the circumstances in that case. And there the interest paid was the annual interest accruing in that year, not arrears of interest as here. Stat. 13 & 14 *Vict. c. 79. s. 4.*, which may be looked upon as an exposition of the policy of the Legislature, enacts that a sinking fund shall be set aside, after payment of interest and "all other annual liabilities;" not after payment of arrears. The justices in petty Sessions had in this case power to make an order, though the insufficiency of the funds arises from a misapplication on the part of the trustees: but that power is to be exercised only when it is expedient, and subject to an appeal to the Sessions, who have decided that it is not expedient.

Hugh Hill and *W. S. Grey*, contrà. *Regina v. White* (a) is directly in point. The Court there must have held that the funds were properly applied; otherwise the justices would not have had power to make the order. [*Erle J.* Is that so? The township at common law was liable to be indicted if the turnpike road was out of repair, though that arose from the neglect of their duty by the

(a) 4 Q. B. 101.

trustees. Is there any authority for saying the township is not liable under the same circumstances to the statutable remedy by this order?] If the funds have not been properly applied, they remain in point of law in the hands of the trustees, who cannot discharge themselves by shewing the unauthorized payments; and therefore the funds are not insufficient. And at all events the reasoning in *Regina v. White* (a) is that the appropriation is altered. Stat. 13 & 14 *Vict. c. 79. s. 4.* does not justify the inference attempted to be drawn from it. The arrears of interest are interest as much as the annual interest.

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Cur. adv. vult.

Lord CAMPBELL C. J., on a subsequent day in this Term (*May 5th*), delivered the judgment of the Court.

In this case we answer the question referred to us by the Sessions, Whether the trustees had by law the power to apply their funds in payment of arrears of interest, left in former years, before the necessary repairs of the road were paid for, in the negative, and affirm the order of Sessions. Under the local Act the duty of the trustees was to apply their funds for repairs before they paid any interest; and it is to be seen whether that duty has been altered by any subsequent statute. Stat. 4 & 5 *Vict. c. 59.*, giving justices a discretionary power to make an order on townships for payments to trustees of turnpikes, where their funds are found insufficient for the repairs, (under which statute the order appealed against was made) does not alter the duty of the trustees, nor give them a right to apply their funds otherwise than as

(a) 4 Q. B. 101.

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directed by their local Act. In case they do apply their funds in a different manner, the justices have a discretion to order payment from the townships, if they choose to exercise it: and that is the effect of the decision in *Regina v. White (a)*, where the question reserved by the Sessions was, whether the justices had power to make the order on the townships, where the funds, according to the local Act, should have been applied first to repairs and then to interest, and they were applied to interest first. The Court does not decide that the local Acts are repealed as to the order of applying the funds: on the contrary, we understand them to suggest that the justices would have exercised a sound discretion if they had refused to make an order unless the funds were applied according to the local Act; but, if they chose in their discretion to make the order on the township, this Court could not say that they had no power to do so.

Since the decision of that case, stat. 13 & 14 *Vict. c. 79. s. 4.* has made a new appropriation of the funds of turnpike trustees, by directing 5*l.* per cent. on the amount of their debt, due before the passing of stat. 12 & 13 *Vict. c. 87.*, to be set apart as a sinking fund, *after* the payment of the interest on any moneys owing on account of the tolls, and all other *annual* liabilities. If the interest mentioned in this appropriation has a priority over repairs, we are clearly of opinion that it is the interest of the current year only that is so affected; for it is interest that is classed with other annual liabilities. The arrears of interest, left unpaid in past years, are classed with the old debt, and to be paid out of the sinking fund, or as the creditor may find his remedy.

(a) 4 *Q. B.* 101.

The trustees have no right, under this statute, to apply their funds to former arrears of interest, instead of repairs, according to their local Act. And we concur with the Sessions in thinking that it was not necessary, or expedient, to cast on the present occupiers in the townships the burden of those arrears of former years.

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Order of Sessions affirmed.

In the matter of GEORGE BAILEY.

Monday,
May 1st.

In the matter of JOHN COLLIER.

O'MALLEY, in last Term, had obtained a rule Nisi for a habeas corpus ad subjiciendum to bring up the body of *George Bailey*, a prisoner in the House of Correction of *Usk* in *Monmouthshire*, and a similar rule in the matter of *John Collier*, also a prisoner in the same place. On the last day of last Term it was, by consent, ordered that cause should be shewn before *Erle J.* at Chambers during the Vacation, and that what the

The return to a habeas corpus ad subjiciendum; to bring up *B.*, assigned, as the cause of *B.*'s detention, a warrant by a justice, which recited, in the past tense, that "*B. was*" this day "convicted before me" of an

offence against stat. 4 G. 4. c. 34., "and I, the same justice, adjudged" that *B.* should be committed for two months with hard labour; and the warrant then, in the present tense, commanded the constables to take and the gaoler to receive *B.* The warrant did not set forth the evidence, nor state that it was taken in the prisoner's presence, or on oath.

Held that, under stat. 4 G. 4. c. 34., the conviction and warrant might be in one instrument, but might also be separate; that the instrument in the present case was not a conviction, but a warrant founded on a previous conviction; and was therefore good in form.

Affidavits were used shewing the evidence before the justice.

Held: that it was open to the prisoner to shew, by affidavit, that there was no evidence from which the justice might reasonably draw an inference that the relation of master and servant existed between prisoner and his employer, as that would shew that the justice had no jurisdiction.

In the present case the affidavits shewed only that there was evidence both ways: and the prisoner was remanded.

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learned Judge should direct should have the same effect as if done by the Court at that time. At Chambers, affidavits were used on both rules. Among them was one by the prisoner *George Bailey*, who stated that he was committed for two months, by a justice of the peace, charged by one *George William Hutchinson* with having absented himself from the work of Messrs. *Marshall & Co.*, his employers. And he deposed: "that it was agreed, between his said employers and himself and fellow workmen, that the rules of his said employers' colliery should be the same as in Messrs. *Prothero's* colliery, namely, to be paid by the ton monthly pays, and a month's notice on leaving or being discharged; but that the price per ton should arise or fall with the price in Messrs. *Prothero's* works, without notice. And deponent further saith that, in the month of *October* last, he was working on the said contract, and that on the first day of *December* last the price did rise in the works of the Messrs. *Prothero's*. And deponent further saith that a rise in price was then requested by the colliers of his employers' said colliery according to the said agreement, which was refused; and, upon this refusal, the deponent and the rest of the colliers ceased working: and this is the misconduct alleged against this deponent, and for which he is now undergoing separate confinement and hard labour." "That deponent is not bound under the said contract to any hours of working; nor is he bound to cut any quantity of coal: that the employment in the said colliery depends on the demand for coal: that there is not always full employment: that deponent is only paid by the ton of coal: that no allowance is made for loss of time when trade is slack or the works stopped by accident." The affidavit then pro-

ceeded to enter into details of matters not relevant to the questions now discussed in Court.

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Collier made an affidavit precisely similar to that of *Bailey*, except that it stated, in addition, that "this deponent had a son working with him on the said contract, and who is employed and paid by this deponent, and not by his said employers."

In opposition, the affidavit of *George William Hutchinson* (sworn in *Bailey's* case) was used. He, by it, deposed that he was the agent of Messrs. *Marshall & Co.*, and that he appeared before the magistrate to support the charge of misconduct against *George Bailey*, "who is a man in the employ of the said Messrs. *Marshall & Co.*, as a collier; that he then proved the custom of the work and the particular contract between him and his employers; and that he also proved the breach of the said contract by the said *George Bailey*." After several statements not bearing on the questions now discussed in Court, the affidavit added: "that the said contract between the said *George Bailey* and his said employers, Messrs. *Marshall & Co.*, was, that he, the said *George Bailey*, should serve his said employers as a collier, until a month's notice should be given, either by himself, the said *George Bailey*, or his employers. And that the contract between the prisoner and his employers, as to wages, was, that the price was to be one shilling and tenpence per ton of coal cut, and was to rise or fall with the generality or line of collieries in the district; and that no allusion whatever was made to the colliery of the Messrs. *Prothero*; but that the price was not to affect the month's notice: and that the said contract was for the said *George Bailey* to serve his employers, the said Messrs. *Marshall & Co.*, exclusively. And that, by the terms of the said

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contract, the said *George Bailey* could not work for any other person during his said service, and until the expiration of his month's notice. And this deponent further saith that, at the time the said *George Bailey* was brought before the said justice, the prices for cutting coal had not risen generally. And this deponent further saith that the said contract between the said *George Bailey* and his said employers, the said Messrs. *Marshall & Co.*, was that, if trade was slack, or works stopped by accident, the said Messrs. *Marshall & Co.* would consider themselves, by the said contract, compelled, either to provide the said *George Bailey*, and the other colliers employed at their said colliery, with work, or pay them reasonable wages. And this deponent further saith that the said *George Bailey* entered upon his said service with the said Messrs. *Marshall* according to the terms of the said contract." In *Collier's* case he made a similar affidavit.

At Chambers, before *Erle J.*, the principal question raised was, whether the contract between the prisoner and Messrs. *Marshall & Co.* was such that the conduct of the prisoner could be considered a breach of it. The learned Judge thought the question one of importance and difficulty. He ordered that the rule should be absolute for a writ to issue, and, by consent, that the prisoner should in the mean time be discharged out of custody, on entering into recognizances to appear, if called upon, at the return of the writ.

The returns of the gaoler to the two writs set out as the ground on which he had detained the prisoners the warrants of commitment. The material part of that in *Bailey's* case was as follows.

"To the constable of" &c., "and to the keeper of" &c. "Whereas, on" &c., "at" &c., "*George William*

Hutchinson, of" &c., "agent to *John Marshall* and others, of" &c., "trading as Messrs. *Marshall & Co.*, coke and colliery proprietors, personally came before *G. H.*, Esquire, a Justice" &c., "and then and there made information and complaint upon oath before me the said Justice, that *George Bailey*, of" &c., "collier, did, on" &c., "at" &c., "contract with the said *John Marshall* and others, to serve the said *John Marshall* and others, in the capacity and employment of a collier, for the term of one month, and so on from month to month, determinable nevertheless on either of the said parties giving to the other one month's previous notice of their intention to determine the said contract, at and for the wages of one shilling and ten pence per ton for cutting coal: and that the said *George Bailey* did, afterwards, to wit on" &c., "at" &c., "enter into his said service according to the said contract: and that the said *George Bailey*, afterwards and before the term of his said contract was completed, to wit on" &c., "at" &c., "was, in the execution of the said contract and otherwise respecting the same, guilty of a certain misconduct and misdemeanor, in this, to wit, that he, the said *George Bailey*, did then and there, and before the term of his said contract was completed, unlawfully absent himself from his said service without the consent of his said masters, and without any lawful excuse, contrary to the form of the statute in that case made and provided: and that the place where the said *George Bailey* was so employed under the said contract is within the said county of *Monmouth*: And whereas the said *George Bailey* was, this 10th day of *December* A.D. 1853, at the parish of *Bedwelty* in the same county, duly convicted before me, the undersigned *G. H.*, one of Her Majesty's

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Justices of the Peace in and for the said county of *Monmouth*, of the said offence so charged upon him in and by the said information as aforesaid; and I, the same Justice, adjudged that the said *George Bailey*, for his said offence, should be committed to the said House of Correction at *Usk* aforesaid, in the said county of *Monmouth*, there to remain and be held to hard labour for the term of two calendar months, according to the form of the statute in such case made and provided: These are therefore to command you, the said constable, forthwith to take the said *George Bailey*, and him safely to convey to the said House of Correction at *Usk* aforesaid, and there to deliver him to the keeper thereof, together with this precept: and you the said keeper are hereby commanded to receive the said *George Bailey* into your custody in the said House of Correction, there to remain and to be kept to hard labour for the term of two calendar months. And for your so doing this shall be your sufficient warrant. Given under my hand and seal " &c.

The return in *Collier's* case set out a precisely similar warrant. The returns respectively then proceeded to excuse the keeper from bringing up the body as commanded by the Court, by shewing that the prisoner had been discharged on his own recognizances, in obedience to the rule of Court drawn up pursuant to the order of *Erle J.* The returns having been now read in Court,

Smythies moved for the discharge of both prisoners. There are objections to the warrant, in each case, apparent on it; and, also, there is an objection going to the root of the whole matter, namely that there was no such contract between the prisoners and *Messrs. Marshall*

& Co. as to give rise to the relation of master and servant, and so give the justices jurisdiction; and no breach of the contract, such as it was. To raise this last objection recourse must be had to the affidavits.

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J. W. Huddleston, for the committing magistrate, objected to the use of the affidavits. He stated that there was reason to believe that, if the conviction were quashed, an action would be commenced against his client; and, that being so, he could not on his behalf waive any objection: but he offered to waive all technical points, and discuss the question solely on the merits, if an undertaking to bring no action were given.

Smythies. It is proposed to use the affidavits, not for the purpose of contradicting the return, but to shew that the justice who made the warrant had no jurisdiction. It appears from the affidavits that this was not a contract of service at all: the employers were not bound to find work; the prisoner was at liberty to work or not as he pleased; all that is agreed on is that, if the prisoner, either by himself or his agents, cut coal, much or little, he is to be paid a price for it; and that the prisoner shall not cut coal for any one else during the time this agreement was not determined. There was no consideration for the contract so as to make it binding; and, supposing that it was binding, there was no breach.

J. W. Huddleston. If the undertaking not to bring an action is given, the justice will consent to have these points raised, and the Court will decide whether the conclusions the justice drew from the evidence were right or not. But, at present, the question is

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jurisdiction ; for, if he had, his finding is conclusive.
[Lord *Campbell* C. J. As at present advised, I think
that the prisoner may use affidavits to shew that there
was no evidence before the justice from which he could
reasonably infer that there was a contract creating the
relation of master and servant, as that would shew
that there was no jurisdiction in the justice. But,
if there was such evidence, it is immaterial to shew
that there was other evidence from which the justice
might have inferred the contrary ; for that would only
go to shew that the finding of the justice on a matter
within his jurisdiction was wrong.]

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The affidavits used at Chambers were then referred
to: it did not appear by them explicitly what evi-
dence was given before the justice ; but the argument
proceeded on the assumption that the affidavits of the
prisoner and of *Hutchinson*, before stated, contained the
facts brought before the justice.

Smythies. The evidence shews that there was no
contract for service at all. The colliers are left free to
do as much or as little as they please ; it is thought that
the obligation not to work for any one else will be a
sufficient inducement to make them work. [Lord *Camp-*
bell C. J. There may very well be a contract, such as
you suggest, not amounting to an engagement on the
part of the employed to work. I may contract with a
fisherman that I will buy all the fish he catches at a
regulated price, he being free to fish or not if he pleases.
But I may also contract with a fisherman that he shall
fish for me every day as my fisherman, his remuneration
being regulated by the quantity of fish he may catch.
Is it possible to say that there was no evidence justifying

the justice in thinking the prisoner's contract of this latter kind?] At least there was no consideration for the contract. The employers were not bound to find work for the prisoner; *Williamson v. Taylor* (a). It would have been a very improvident bargain if they had contracted to do so; for their colliery might be stopped by a flood, or some other accident over which they had no controul. [Lord Campbell C. J. It may very well be that they did not contract to keep their colliery open, and yet that if, the colliery being open, they excluded the prisoner they would have broken their contract. If they agreed to keep up the relation of employers and employed, it would be a breach if they renounced it; and such an agreement would be ample consideration. And it may be that the other party did not bind himself to work every day, so that it would be no breach of his engagement if he took an occasional holiday, yet, if he engaged to continue the relation of employer and employed, it would be a breach of his engagement to renounce it by entering upon a strike. *Huddleston* referred to that part of the affidavit of *Hutchinson* in which it was stated that the employers considered themselves bound either to provide the men with work or pay them wages. *Crompton J. Regina v. Welch* (b) and *Pilkington v. Scott* (c) go far to shew that the employers were so bound. But, in the mode in which the point is raised, the only question is whether the prisoner can shew affirmatively that the contract was such that the justice had not jurisdiction.] In *Regina v. Welch* (b) the servant had agreed to work personally. In this case it appears from *Collier's* affidavit that the colliers employed workmen under them. The

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(a) 5 Q. B. 175.

(b) 2 E. & B. 357.

(c) 15 M. & W. 657.

1854. relation of master and servant does not exist except
 BAILEY'S where the engagement is to serve personally; *Riley v.*
 Case. *Warden (a)*, *Hardy v. Ryle (b)*, *Lancaster v. Greaves (c)*.

Then the conviction is bad on the face of it; as it does not state that the evidence was on oath, or taken in the presence of the prisoners. That was necessary before stat. 11 & 12 *Vict. c. 43.*; *In re Gray (d)*, *Regina v. Tordoft (e)*: and that Act does not affect a warrant of commitment such as this.

J. W. Huddleston, contra, was desired by the Court to confine his argument to the last point only. The distinction between this case and those cited depends on the peculiar nature of the enactment in stat. 4 *G. 4. c. 34. s. 3.* If it appear to the justice that the accused is guilty, the justice is authorized to commit him. The justice must therefore in substance convict the accused, and make a warrant for his commitment. But he is not called upon to make the warrant a record of the conviction: he may do so if he pleases; and, if he does make it a record of the conviction, then it must have all the requisites of a conviction. In *Regina v. Tordoft (e)* the words were "I do therefore convict;" and *Patteson J.* calls attention to that. The instrument was therefore in that case a conviction. But in *Regina v. Richards (g)* the return to the habeas corpus shewed a good warrant reciting in the past tense a previous conviction, and it was held that was a good ground of detention; though the only conviction brought before the Court was informal. *Lindsay v. Leigh (h)* shews only that the justice

(a) 2 *Exch.* 59.

(c) 9 *B. & C.* 628.

(e) 5 *Q. B.* 933.

(b) 9 *B. & C.* 603.

(d) 2 *Dow. & L.* 539.

(g) 5 *Q. B.* 926.

(h) 11 *Q. B.* 455.

may make a single instrument that shall be both a conviction and a warrant of commitment, and that, if he does make such an instrument and return it, a formal conviction subsequently drawn up is too late. The instrument in the present case is a warrant of commitment on a conviction, following the form (P. 1.) in the schedule to stat. 11 & 12 *Vict. c. 43*. *In re Gray (a)* is really an authority that this warrant is good. *Patterson J.* there in his judgment puts the decision on this very distinction. He says: "where, under this Act of Parliament, the conviction and warrant of commitment are in the same document, (which it is by no means necessary that they should be, but which they are in the present case,) it must appear on the face of that document, that the evidence on which the conviction proceeds was given on oath, and in the presence of the prisoner."

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Lord CAMPBELL. C. J. That authority shews that the instrument in the present case is sufficient. It is not a conviction, but a warrant in execution of a previous conviction; and, being so, it does not require the formalities of a conviction. There may, under this statute, be an instrument drawn up of a hybrid character, so that it is at once a conviction and a warrant; but the instrument in the present case does not fall within that category. There is nothing in the decision in *Lindsay v. Leigh (b)* to shew that there may not be a separate conviction, as under ordinary Acts, and a warrant founded on it, though, by the provisions of this particular Act, such a conviction may be dispensed with, in favour of the prosecution. Then there is nothing

(a) 2 *Dow. & L.* 539. 549.(b) 11 *Q. B.* 455.

1854. here to shew that the witnesses were not, in point of fact,
sworn, and examined in the presence of the prisoners,
or that the prisoners had not in fact the full benefit of
every thing to which they were entitled : and this, being
a warrant, is in this respect good on the face of it.

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It is also good on its face, as shewing that there was a contract of service, and a breach of that contract. Still it would be open to the prisoners to shew that the justice had no jurisdiction: and, if they shewed that there was no evidence before the justice on which he was warranted in coming to the conclusion that there was a contract of service and a breach of it, I think this would shew that he exceeded his jurisdiction. In the present case let us proceed on the supposition (which is not strictly borne out by the proof) that the statements in the affidavits were the same statements which were in evidence before the justice. Can we, looking at them, say that there was no evidence from which he might justly infer a contract of service? If the contract was, like that which I supposed during the argument to have been made with a fisherman, a contract to buy the proceeds of their labour, it would not be a contract of service. But the justice was fully warranted in inferring that this was a contract to serve for a month, and to be paid according to the work done. It has been said that there was no consideration for such a contract; but I, on this evidence, think that there was an obligation on the part of the employers, not merely to pay for the work done, but also to employ the men: not, I think, necessarily to find them work day by day; but an obligation to continue the relation of master and servant; so that, if the master causelessly refused to give the servant work, whilst the colliery was open, he would

have broken his contract. That obligation on the part of the master would be ample consideration for the servant's promise. Then it is said that the contract was not one for personal service : and it appears that one of the men was permitted to employ another person to assist him ; but still there was evidence enough before the justice from which he might infer that the contract bound the men to work personally. Then, if there was evidence from which the justice was warranted in concluding that there was a contract for service, it was for his determination whether there was a breach. I have no jurisdiction to review his determination on that point ; and I do not inquire whether it was right or not.

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WIGHTMAN J. The first question is, Whether it has been affirmatively shewn, contrary to the allegations in the warrant, that the justice had no jurisdiction. It is alleged in the warrant that there was such a contract as would give the justice jurisdiction ; and the onus is cast on those impeaching the warrant of shewing that there was no reasonable ground on which the justice might find this. It is not enough that there was ground on which he might have reasonably found that there was no such contract ; for the justice is not bound to believe one side more than another : and, therefore, if there was any evidence before him from which he might reasonably infer that there was such a contract, it is enough. It is said that there was nothing to justify the justice in inferring that the contract was one for personal service ; but it is agreed on both sides that a month's notice was stipulated for, and that till it was given the miner was not to be at liberty to enter into the service of any one else. Now I think that it is a reasonable inference from

1854. those provisions alone that the bargain was for his personal services.

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As to the formal point, I quite agree. There is nothing in the case of *Lindsay v. Leigh* (a) at all in conflict with our present decision. The Court of Error there said, in effect, that, if there is an order of commitment under this Act, no other formal conviction is required, and the instrument in such a case is both the conviction and the warrant; though, if it is an order of commitment, it does not require the same formalities as a conviction. But there is nothing in *Lindsay v. Leigh* (a) to shew that there may not be separate instruments, one a conviction and the other a warrant. If we are to treat the instrument in the present case as a conviction, we contradict its terms; for it recites a previous conviction. It is therefore a warrant only.

ERLE J. I agree that the prisoners must be remanded. As to the point of form. It is important to lay down a rule by which persons enforcing the law may be relieved from the risk of being defeated on formal grounds. The words of the Act in question, "it shall and may be lawful for such justice to commit every such person," have raised the difficulty. The Legislature contemplated that the justice might convict and commit at once. Accordingly, there have been a series of cases in which attempts have been made to unite in one instrument the record of the conviction and the warrant for the imprisonment; and a series of objections, arising from the twofold nature of those instruments. At last in *Regina v. Richards* (b) the two instruments

(a) 11 Q. B. 455.

(b) 5 Q. B. 926.

were separated. It seems to me that the points before the Court of error in *Lindsay v. Leigh* (a) did not raise the question whether this might be done. I have no hesitation in supporting the doctrine of *Patteson J.* in *In re Gray* (b), that it is by no means necessary that the conviction and warrant of commitment should be in the same document. Here they are not; and consequently the warrant is formally good.

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As to the point of substance, it had great weight with me at Chambers. But the question is now so raised that the only point is whether the justice had reasonable grounds for finding a contract of service. I always thought it a case in which any man might doubt: and now, when I find that three Judges are inclined, on this evidence, to think that a contract of service actually existed, it is of course out of the question to say that the justice might not reasonably draw the same conclusion.

CROMPTON J. As to the point of form. I can see nothing to shew that this warrant was not founded on a good previous conviction.

As to the point of substance. Certainly I am not prepared to say that there was no reasonable ground for finding that there was such a state of things as would give the justice jurisdiction. The point on which I should feel most doubt, if it were necessary to find the fact, is, as to whether this was a contract for personal service. But there was evidence tending to shew that it was; particularly the evidence of an agreement that the employers would find work or pay wages; an agreement which could never be made if the miner was not

(a) 11 Q. B. 455.

(b) 2 Dow. & L. 549.

1854. to work himself, but might employ as many people as
 BAILEY'S he pleased under him. But we cannot interfere unless
 Case. we see it made out negatively that there was no
 evidence to warrant the justice's finding. And it is
 clear that there was evidence.

Prisoners remanded.

Tuesday,
 May 2d.

SAMUEL GURNEY, DAVID BARCLAY CHAPMAN,
 SAMUEL GURNEY the younger, and HENRY
 EDMUND GURNEY *against* HEINRICH THEODOR
 BEHREND, PAUL AUGUSTUS ADOLPHE BEHREND,
 and MAXIMILIAN BEHREND.

B., a *Dantzick*
 merchant, sold
 wheat to *W.*,
 an *Amsterdam*
 merchant, to
 be paid for by
 drafts, to be
 drawn by *B.*
 on *C.*, a *London*
 merchant,

TROVER for wheat: Pleas, Not guilty, and Not
 possessed.

On the trial, before Lord *Campbell* C. J., at the *Lon-*
don sittings after *Trinity* Term, a verdict passed for the
 plaintiffs, with 3725*l.* damages, subject to a case.

against bills of lading. *W.* was in fact, though that was not disclosed to *B.*, acting for *P.*, another *London* merchant. *W.* wrote to *C.* opening a credit, on account of *P.*, in favour of *B.*, to be drawn on against bills of lading, *P.* to be debited with the amount. *B.* forwarded a bill of lading, indorsed by him in blank, to *C.* in a letter stating that, "according to instructions from *W.*," we hand you bill of lading, "and request you to follow" his instructions respecting the document, "by whose order, and for whose account," we draw on you, "which drafts we recommend to your kind protection." On the day after *C.*'s receipt of this letter, the draft was left with *C.* for acceptance. *P.*, on the same day, being in actual possession of the bill of lading, pledged it with *G.*, who *bona fide* gave value for it. On the evening of the same day, *P.* was arrested on a criminal charge; and he afterwards became bankrupt. *C.* did not accept the draft; and, on the ensuing day, became bankrupt. *W.* also failed. *B.* stopped the cargo in transitu. *G.* brought trover against him for the cargo.

On a case stating the above facts, with power for the Court to draw inferences of fact;

Held, that *B.* *prima facie* had the right to stop in transitu; and that *G.*, though a *bona fide* transferee for value of the endorsed bill of lading from *P.*, was not entitled to the cargo, unless *P.* had, not merely possession of the bill of lading, but a right to transfer it; inasmuch as bills of lading are not negotiable to the same extent as bills of exchange.

But held: that *C.* was entitled to hand over the bill of lading to *P.*; the letter from *B.* not imposing any condition to prevent *C.* from doing so. And the Court, as an inference of fact, thought that *C.* had so handed it over to *P.*

Judgment for plaintiff.

By this it appeared; that the plaintiffs were *London* money merchants trading under the firm of *Overend, Gurney & Co.*, and the defendants merchants at *Dantzic* trading under the firm of *Th. Behrend & Co.* The action was brought to try the right to the cargo of the ship *Erute*, which the plaintiffs claimed as holders of the bill of lading. The bill of lading was for wheat in bulk, shipped by *Th. Behrend & Co.* at *Dantzic*, deliverable in *London* to order or assigns, and was indorsed in blank by *Th. Behrend & Co.* On 2d *February* 1853, the ship arrived in the *Thames*, and defendants took possession of the cargo in the ship, and kept it. The case shewed that *Overend, Gurney & Co.*, in the ordinary course of business, made an advance on the security of the bill of lading to Messrs. *Coventry & Sheppard* on the 8th *January* 1853. *Coventry & Sheppard* had, in the course of business, made large advances to *Robert Ferdinand Pries*, in *London*, and had received this bill of lading from him, on the same 8th *January*, as a part security for these advances, and for fresh advances then made. *Robert Ferdinand Pries* was a corn merchant, then in good credit: but, on the evening of the same day, he was arrested on a criminal charge, not connected with this bill of lading, and had since become bankrupt. The case stated the particulars of these transactions at some length: it appeared that the whole was bonâ fide as regarded *Overend, Gurney & Co.* and *Coventry & Sheppard*; so that the real point was, whether *Pries* had obtained the bill of lading under such circumstances as to be able to confer a good title on a bonâ fide transferee. The circumstances under which *Pries* obtained the bill of lading were thus stated in the case. The cargo was bought of the defendants by Mr. *E. Werthemann*, a merchant at *Amsterdam*: *Werthemann* in point of fact bought

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the corn for *Pries*; but that fact was unknown to the defendants. They only knew *Werthemann* in the transaction; and payment of the price at the rate of 40s. per quarter was to be made in the manner stated in the following letters. *Collmann* and *Stolterfoht*, mentioned in those letters, were a firm, in a large way of business as merchants and commission agents, who had had very large dealings with *Pries* during the time he was in business.

On the 31st *December*, 1852, *Werthemann* wrote and sent the following letter to Messrs. *Collmann* and *Stolterfoht*, *London*.

“*Amsterdam*, 31st *December*, 1852.

“By order and for account of Mr. *Robert F. Pries*, I beg to inform you that I have opened a credit with your house in favour of Messrs. *Th. Behrend & Co.* in *Dantzig* for 10,000*l.* : Ten thousand pounds.

“I therefore request you to honor the drafts at 2 m. d. of said *Dantzig* friends for this amount, against bills of lading of wheat, at the rate of 40s. per quarter, and to debit Mr. *Robert F. Pries* for them. *E. Werthemann*.”

On the 4th *January* 1853, the defendants forwarded the said bill of lading of the *Erute* to Messrs. *Collmann* and *Stolterfoht*, at *London*, in a letter of which the following is a copy.

“*Dantzig*, 4th *January*, 1853.

“According to instructions from Mr. *E. Werthemann*, *Amsterdam*, we have the pleasure of handing you inclosed bill of lading of 9200 scheffels wheat, with 200 bags and 700 mats, by the ship *Erute*, Capt. *Zielcke*, to that (a) port, and request you to follow the instructions of said *Amsterdam* friend respecting these documents, by whose order, and for whose account, we have to day taken the liberty of valuing on you 341*8l.* 2 m. d. o.

(a) Sic: but obviously meaning *London*, not *Amsterdam*.

R. Warschaur & Co., which drafts we recommend to your kind protection for account of Mr. *E. Werthemann. Th. Behrend & Co.*"

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This letter of the 4th *January* was received by Messrs. *Collmann & Stolterfoht* (with the bill of lading) on the 7th *January*: and they replied to it, on the 8th of *January*, by a letter of which the following is a copy.

"Your favour of the 4th inst. is to hand with B. L. of 9200 scheffels of wheat shipped, by order of Mr. *E. Werthemann* in *Amsterdam*, to this port per *Erute*, Capt. *Zielke*, with which document we shall follow the orders of said friend. Your drafts on us against this shipment amounting 3418*l.* 2 m.d. will be promptly protected on presentation, for account of Mr. *E. Werthemann. Collmann & Stolterfoht.*"

On the same 8th day of *January* (which was a *Saturday*), the defendant's said drafts for 3418*l.*, drawn conformably to said letters, were left by the defendants' agents (Messrs. *Hambro & Son* of *London*) at the counting house of *Collmann & Stolterfoht* there for acceptance, according to the usual and ordinary custom in cases where bills of exchange are left for acceptance.

On the morning of *Monday* the 10th of *January*, in accordance with the custom in such cases, a clerk of Messrs. *Hambro & Son* called at the counting house of *Collmann & Stolterfoht* for the said bills of exchange, when they were handed to him dishonoured and without ever having been accepted. On the bills of exchange being returned to *Hambro & Son* dishonoured, on *Monday* the 10th, they demanded of *Collmann & Stolterfoht* the return of the bill of lading also: but it was not then, or at any time afterwards, returned to them, or to the defendants. It appeared, in evidence at the trial, that

1854. the bill of lading was in *Collmann & Stolterfoht's* possession on the morning of *Saturday* the 8th of *January*.
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BEHREND. On the 10th of *January*, *Coventry & Sheppard* had notice from *Collmann & Stolterfoht* that they, *Collman & Stolterfoht*, claimed the bill of lading. On the same 10th of *January*, *Collmann & Stolterfoht* stopped payment. *Werthemann* also stopped payment; and the defendants have never been paid any part of the price of the wheat.

The wheat was shipped on board the *Erute* under a charter party, which was set out in the case. By it *Th. Behrend & Co.* chartered the *Erute* for a voyage from *Dantzic* to *London*. There was nothing peculiar in the terms of the charter party.

After setting it out, the case stated: "No evidence, save as aforesaid, was given, on either side, of the circumstances under which *Pries* had possession of the bill of lading. The Court are to have the same power as a jury to draw inferences. The question for the opinion of the Court is: Whether the plaintiffs are entitled in this action to recover the value of the wheat less the freight and charges paid by the defendants. If they are, then the verdict is to stand for the plaintiffs for 3725*l.*; otherwise a nonsuit, or verdict for the defendants, is to be entered as the Court may direct."

The case was now argued (*a*).

Willes, for the plaintiffs. The defendants, being unpaid vendors, had a *primâ facie* right to stop the goods in transitu had not the bill of lading been indorsed for value to the plaintiffs. It is clear that the holder of a bill of lading is entitled to the cargo as against the

(a) Before Lord Campbell C. J., *Wightman*, *Erie* and *Crompton* J.

unpaid vendors; *Lickbarrow v. Mason* (a): but the defendants say the plaintiffs are not holders of the bill of lading, inasmuch as, they say, *Pries* could not transfer it to them. That raises two questions; one of fact, viz.: whether *Pries*, on the 8th of *January*, obtained the bill of lading from *Collmann & Stolterfoht* with their consent, or stole it: and one of law, viz.: what the effect of his obtaining it by their consent was. Now, as to the question of fact, there seems but one inference to be drawn. It appears that *Werthemann*, as *Pries*'s agent, opened a credit with *Collmann & Stolterfoht* on *Pries*'s account for 10,000*l.* to be drawn upon by *Th. Behrend & Co.* against bills of lading; and he directed them to debit *Pries* with the drafts: *Th. Behrend & Co.* send the bill of lading to *Collmann & Stolterfoht*, desiring them to follow the directions of *Werthemann*, which they, by their letter in answer, promise to do. *Werthemann* had already directed them to hold the bill of lading for *Pries*, who was, as is stated in the case and is evident from the ease with which he got credit for 10,000*l.*, then in good credit. *Pries*, on that morning of the 8th *January*, wanted the bill of lading for a perfectly legitimate object; and he is found in possession of it, dealing with it openly as owner. Surely the inference is that *Collmann & Stolterfoht* had allowed him to take it. That raises then the second question, viz.: whether *Collmann & Stolterfoht* and *Pries* could, together, give a good title to the cargo by the transfer of this bill of lading. As to that, the defendants mean to contend that the correspondence

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(a) In K. B., 2 T. R. 63; *Mason v. Lickbarrow*, in Exch. Ch., 1 H. Bl. 357; *Lickbarrow v. Mason*, in Dom. Proc., note (a) to *Newsom v. Thornton*, 6 East, 20. See *Lickbarrow v. Mason*, 5 T. R. 367, 683; Note to 1 Smith's Lead. Ca. 432.

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shews that the bill of lading was deposited with *Collmann & Stolterfoht*, subject to a condition that, before the bills of lading should be parted with, the drafts should be accepted. If such were the condition between the defendants and *Collmann & Stolterfoht*, it still could not affect a bonâ fide taker of the bill of lading, for value and without notice. It would be most dangerous to commerce, if secret conditions could be attached to documents of this sort, on the face of them transferable without any condition. But, in the present case, there was no such condition even as between the parties. The letter of 4th *January*, from *Th. Behrend & Co.* to *Collmann & Stolterfoht*, states that the bill of lading was forwarded by instructions from *Werthemann*, and contains a request to *Collman & Stolterfoht* to follow *Werthemann's* instructions concerning the documents, and a statement that, on his account, they had drawn against it. *Collmann & Stolterfoht* by merely keeping the bill of lading, sent to them on these conditions, impliedly promised to accept the drafts when they came; and, if they had continued *sui juris*, an action would have lain against them for not accepting the drafts. In the present case that promise is not left to implication; for they, by their letter of 8th *January*, expressly make the promise which would otherwise be implied from their keeping the bill of lading. But what is there in the letters to indicate any wish, on the part of *Th. Behrend & Co.*, that the drafts should be accepted before the bill of lading was parted with, if *Werthemann's* instructions should be that it was to be parted with? [*Crompton J.* The draft and the bill of lading were not attached to each other. The bill of lading was sent direct; and the draft, for anything apparent in the letters,

might be put in circulation, and pass through many hands, so as to be long of coming for acceptance: and *Pries's* instructions, which you say were in law *Werthe-mann's*, were, as you wish us to infer as a fact, given on the morning of the 8th *January* before the time for accepting the drafts had come.] Precisely so. If a consignor wishes to keep the controul of the cargo he must keep the bill of lading in his own hands or in those of his agents; *Key v. Cotesworth (a)*, *Turner v. Trustees of the Liverpool Dock (b)*. In fact, the drafts were accepted; for, being foreign bills, the letter of 8th *January* amounted to an acceptance.

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Bramwell, contra. The plaintiffs are not such holders of the bill of lading as to be entitled to defeat the right to stop in transitu. Bills of lading are transferable, not negotiable like bills of exchange: and the right to the cargo could not be given by *Pries* even to a bonâ fide purchaser, unless *Pries* was possessed of the bill of lading under such circumstances as to enable him to transfer the title under it. That raises the question whether *Pries* was so possessed, which is a mixed question of law and fact. It is quite clear that the vendors of goods, consigning them to a purchaser, may so deal with the bill of lading as to preserve to themselves a security that the cargo shall not be delivered, unless the drafts they draw for the price are accepted. It is a common thing for the consignor to send the bills of lading and the drafts together to his agent, with directions to give up the bills of lading when the drafts are accepted. Had *Th. Behrend & Co.* in the present case sent the bill of

(a) 7 *Exch.* 595.(b) 6 *Exch.* 543.

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lading and the draft to *Collmann & Stolterfoht* with such directions, it would have been clear that they retained a lien: and, if *Collmann & Stolterfoht* had, under that state of facts, parted with the bill of lading to *Pries*, it would have been in violation of their duty; and *Pries*, who would thus tortiously have got possession of the bill of lading, could not have conferred any right on the plaintiffs. It is said that it would be inconvenient that secret conditions should be attached to the transfer of a bill of lading: and it is true that mere possession of a bill of exchange indorsed in blank enables the possessor to confer a good title on a bonâ fide taker for value, though he himself has no title; but no such effect results from the possession, either of goods, or of the bill of lading, the symbol of possession of goods. Now, in the present case, the course pursued by *Th. Behrend & Co.* was exactly equivalent to sending the bill of lading and draft to *Collman & Stolterfoht* with instructions not to part with the one till the other was honoured. The letter of 4th *January* from *Th. Behrend & Co.*, in which was inclosed the bill of lading, states that they had drawn against the shipment. *Collmann & Stolterfoht* ought to have understood that to mean that they were, in the ordinary course, to keep the bill of lading till the drafts were accepted: and, even supposing that they were not legally bound to do so, the Court will not infer, as a fact, that they did deliver it to *Pries* in violation of the ordinary course of business. [*Crompton J.* The course of business, which you describe, was common enough a few years ago: the bill of lading was attached to the draft and sent to an agent with directions not to part with it till the draft was accepted; and, particularly in the trade between *America* and *Liverpool*, it was common enough to insist on retain-

ing the bill of lading till the draft was not only accepted but paid, or satisfactory security given that it would be ultimately paid; and questions of great nicety arose when the right so to retain it was disputed. But I always understood this to be an exceptional course, adopted only in times of peril and suspicion; whilst your argument assumes that it is the ordinary course of trade. Lord Campbell C. J. The bill of lading was not in this case attached to the draft: on the contrary, the letter of 4th *January* tells *Collmann & Stolterfoht* that it was drawn at two months, to the order of *R. Warschaur & Co.*, a third party; so that it might continue in circulation and not be presented for acceptance for the whole of these two months. Do you say that the vendee was to have his power to deal with the goods suspended till an event over which he could have no controul? That would be hard on him. *Erle J.* Must you not take the letters of 4th *January* and 31st *December* together. *Th. Behrend & Co.* say "Follow the instructions of said *Amsterdam* friend respecting these documents." The instructions were in the letter of 31st *December.*] *E. Werthemann's* right to give instructions was conditional on the drafts being accepted. Further: this is not a case of stoppage in transitu, but a case in which the property never vested in the intended vendee at all. The property in goods consigned to a purchaser vests in him: but, if the intention be, from the first, that the purchaser shall not have them, the property does not vest. In *Key v. Cotesworth* (a) the bill of lading made the defendants consignees by name, which was strong evidence that the shipment was for their benefit. [*Crompton J.*

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(a) 7 *Exch.* 595.

1854. There are cases in which the consignment is for the purchaser, and yet the vendor has preserved the controul by keeping back the bill of lading.] It is difficult to see how that is consistent with the goods being on account and at the risk of the purchaser during the voyage. [Crompton J. That difficulty, which is considerable, was much discussed in *Turner v. Trustees of the Liverpool Docks* (a).] Besides that, the goods were on board a ship chartered by *Th. Behrend & Co.*, and therefore not in transitu, but in the possession of *Th. Behrend & Co.* [Lord Campbell C. J. Can you for this purpose make a distinction between a general ship and a chartered ship?] It is said that the drafts, being foreign bills, were accepted by the letter of 8th *January*. [Lord Campbell C. J. You need say nothing on that point: if *Th. Behrend & Co.* stipulated, at all, for an acceptance before the bills of lading were parted with, it was for an acceptance on the face of the drafts; moreover, a promise to accept is not an acceptance unless at the option of the promisee; and there is nothing here to shew that there was an election to take the letter of 8th *January* as an acceptance.]

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Willes, in reply. The condition, if there was one, would not affect purchasers: to have that effect it ought to have been in the bill of lading, as was the case in *Barrow v. Coles* (b). If once property is delivered to a purchaser, a condition subsequent is only in contract, and does not affect the property; *Howes v. Ball* (c). It is the same with the symbol.

Cur. adv. vult.

(a) 6 *Exch.* 543.

(b) 3 *Campb.* 92.

(c) 7 *B. & C.* 481.

Lord CAMPBELL C. J., on a subsequent day in this Term (*May 3d*), delivered judgment.

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We think that the only question in this case is, whether the defendants had a right to stop in transitu the cargo of the *Erute*, on the 2d of *February*, when they took possession of it. We cannot doubt that, subject to the right of stopping in transitu, the property vested in the vendee, when the cargo had been loaded at *Dantzig*, and the indorsed bill of lading had been sent off by the defendants to *Collmann & Stolterfoht*. Nor does there seem to us to be any ground for contending that the defendants afterwards continued in possession of the cargo. They had chartered the ship; i. e. they had entered into a contract with the captain, that he would carry the cargo in his ship from *Dantzig* to *London*; but the ship was not their's: he was bailee of the cargo; and it was in the possession of the carrier. There can be no lien without possession; and the claim of the defendants to a lien as unpaid vendors is quite unfounded. From such considerations the equitable right of an unpaid vendor to stop in transitu took its origin: and this right would have been wholly unnecessary, if the goods, while in transitu, could be considered in the possession of the vendor.

(*Primâ facie* the defendants had a right to stop the wheat on the 2d of *February*; for it was still in transitu, and they were unpaid vendors. The onus lies on the plaintiffs, to prove that they had become the owners, and that the right to stop in transitu was gone. For this purpose it is not enough that they had become bonâ fide holders of the indorsed bill of lading, for valuable consideration. A bill of lading is not, like a bill of exchange or promissory note, a negotiable instru-

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ment, which passes by mere delivery to a bonâ fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him, or transferred without his authority, a subsequent bonâ fide transferee for value cannot make title under it, as against the shipper of the goods. The bill of lading only represents the goods: and, in this instance, the transfer of the symbol does not operate more than a transfer of what is represented. ✓

We are therefore to inquire whether this bill of lading is to be considered as having come into the possession of the plaintiffs, before the stoppage in transitu, with the authority of the defendants. And this depends entirely upon whether *Collmann & Stolterfoht* had authority from the defendants to deliver it to *Pries*. We think it as clear that *Collmann & Stolterfoht* delivered it to *Pries*, as that *Pries* delivered it to *Coventry & Sheppard*, and *Coventry & Sheppard* to the plaintiffs. But, if this delivery to *Pries* was a misappropriation of the bill of lading, the rights of the defendants will be the same as if it had remained in the hands of *Pries*, or of *Collmann & Stolterfoht*, till the 2d of *February*, in which case the stoppage in transitu would have been rightful.

It is contended on the part of the defendants that *Collmann & Stolterfoht* had no authority to part with the bill of lading till they had accepted the bill of exchange drawn for the price of the wheat. If this be so, they certainly exceeded their authority; for their promise to accept, which was not treated by the agents of the

defendants as an acceptance, would not have been a performance of the condition on which the right to part with the bill of lading depended. The defendants might easily have imposed such a condition, had they suspected the solvency of the parties with whom they were dealing. But, looking to the correspondence set out in the special case, and to all the circumstances of the transaction, we are of opinion that no such condition was imposed, and that, as soon as *Collmann & Stolterfoht* received the bill of lading, they were at liberty to hand it over to *Pries*, so as to make the result the same as if, by the bill of lading, *Pries* had been the consignee, the defendants had remitted it to him, and he had indorsed it before handing it over to *Coventry & Sheppard*. There is nothing on the bill of lading itself to indicate that it is not to be transferred till the bill of exchange has been accepted. In the defendant's letter of 4th *January* no such condition is to be found; and, on the contrary, they desire *Collmann & Stolterfoht* to follow the instructions of *Werthemann* respecting the bill of lading, *Werthemann* being the agent of *Pries*, and having purchased the cargo for him. They go on to say that they have drawn the bill of exchange for the price, but merely "recommend it to protection," without saying any thing that can be construed into a direction that this protection shall be given before the instructions of *Werthemann* are followed respecting the bill of lading. There seems no reason to doubt that the defendants would have been perfectly satisfied with the answer written to them on the 8th of *January*, in which *Collmann & Stolterfoht* first say that they will follow the directions they had received respecting the bill of lading; and afterwards, in a separate sentence, add that they would protect the bill of exchange "on presentation."

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The circumstances of the transaction, instead of raising the supposed condition by implication, are rather inconsistent with it. While the bill of lading is forwarded to *Collmann & Stotterfoht*, the bill of exchange is sent to Messrs. *Hambro & Son*. The bill of exchange happened to be left for acceptance on the 8th of *January*: but, ab initio being dissevered from the bill of lading, it might have been negotiated at *Dantzic*; and, circulating over the north of *Europe*, it might not have been presented to the drawees for a month afterwards. Would *Collmann & Stotterfoht* have been bound to keep the bill of lading in their hands during the whole of this time? On the contrary, we think that *Pries*, having lodged the credit according to his undertaking, was immediately entitled to have the bill of lading delivered up to him, on producing an order to that effect from *Werthemann*; and he could not be made to run the risk of a fall in the market in the interval elapsing before the bill was presented for acceptance.

If the language of the letter of 4th *January* were equivocal, the construction to be put upon it ought rather to be against the party who places an indorsed bill of lading in the hands of third persons, and enables them to deal with others as if they had complete controul over it; but, in this case, we think that the language of the defendants, expressly and clearly, authorized the unconditional transfer of the bill of lading to the purchaser.

No decision or dictum was cited in the argument which at all conflicts with the view we have taken of this case: and we conceive that it is in entire conformity with the various decisions relied upon by the plaintiffs. These we abstain from commenting upon, as they appear to be in harmony with each other, and we entirely

approve of them. Ever since the great case of *Lickbarrow v. Mason* (a) the law has been considered to be that the bonâ fide transferee, for value, of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or consignee, has an absolute title to the goods, freed from the equitable right of the unpaid vendor to stop in transitu, as against the purchaser; and we believe it to be of essential importance to commerce that this law should be upheld. For these reasons we give

Judgment for the plaintiffs.

(a) See note (a), ante, p. 627.

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The QUEEN against the Inhabitants of . *Wednesday,*
BENJEWORTH. *May 3d.*

ON appeal against an order of two justices, for removal of *Harriet Berrington*, the wife of *John Berrington*, and her three lawful children, from the parish *St. James, Clerkenwell*, in *Middlesex*, to the parish of *Benjeworth* in *Worcestershire*, the Sessions confirmed the order, subject to the opinion of this Court upon a case stating substantially as follows.

The grounds of removal, so far as material to the case, alleged as follows.

Harriet Berrington was the wife of *John Berrington*, a prisoner under sentence of transportation. In 1832, *John Berrington* hired by the year a separate and distinct tenement, consisting of a dwelling house situate in the

No settlement is gained by the occupation of a tenement, by reason of payment of rates under stat. 3 & 4 W. & M. c. 11. s. 6., if the payment be made by a party not authorized by the occupier to make the payment.

1854. parish of *Benjeworth*, at the rent of 30*l.* a year: and
The QUEEN he held, rented and actually occupied and resided in the
v. said house, under the said yearly hiring, for two years;
Inhabitants of and he paid the said rent in each of such years; and he
BENJEWORTH. was charged with, and paid his share of, the poor rates
of the said parish in respect of the said house, and
resided therein for forty days after payment thereof.

The appellants in their grounds of appeal traversed these settlements.

At the trial of the appeal, the respondents relied solely upon the settlement by payment of taxes. And they proved that settlement to the satisfaction of the Court of Quarter Sessions, if the following facts as to the payment of the poor's rate are sufficient in point of law.

It was proved by *Harriet Berrington*, the wife, that she had seen the poor rates, in respect of the house in question, paid on two several occasions by her husband, *John Berrington*, during his occupation thereof; and that she believed they continued to live there for more than two months after the last payment. The appellants called *John Berrington*; who stated that he had no recollection of having paid any rates or taxes for the house in question; and that, if they were paid, the payments were made for him by his wife's father, as he had not the means of paying them. The respondents then called for the rate books which they had given the appellants notice to produce; but the appellants did not produce them.

"The Court of Quarter Sessions found, upon the evidence, that the rates were paid by the father in law for the pauper, and that he resided for upwards of forty days after payment; but that he had no authority from the pauper to pay them."

The question for the opinion of this Court is whether, on the above evidence and finding, the Sessions were right in confirming the order. If so, order of removal and order of Sessions to stand confirmed; if otherwise, to be quashed.

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Pashley, in support of the order of Sessions. The question is, whether this was a payment by *John Berrington* of rates, within stat. 3 & 4 *W. & M. c.* 11. *s.* 6. He occupied the tenement, and was assessed. On the other side, it will be contended that, inasmuch as the father in law had no authority from the pauper to pay, the rates were not, in legal effect, paid by the pauper. But in *Rex v. Bridgewater (a)*, where a friend of the pauper, without any communication with him, and in his name, paid land tax to prevent a distress, this was held to be a payment by the pauper.

Archbold and *Clarkson*, contra, were not called on.

LORD CAMPBELL C. J. Can any stranger to a man make himself the man's creditor by paying his debt? In *Rex v. Bridgewater (a)* the Court must have understood the Sessions to have thought there was an authority; if they did not, I think the decision not law. Here the authority is expressly negatived.

WIGHTMAN J. I suppose the Court in *Rex v. Bridgewater (a)* thought that the authority was to be inferred from the relation of the parties.

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CROMPTON J. (a). That must have been their inference of fact, right or wrong. They could not have meant to break in upon the principles of common law.
 Order of Sessions quashed.

(a) *Erle J.* was absent.

Thursday,
May 4th.

The QUEEN against JARVIS.

Under stat. 5 & 6 W. 4. c. 63., the Sessions have power to appoint inspectors of weights and measures; and, for such appointment, they may, if they think fit, select inspectors and superintendents of rural police (acting under stat. 2 & 3 Vict. c. 93.): and therefore such appointment cannot be removed by certiorari, sect. 36 of stat. 5 & 6 W. 4. c. 63. taking away the certiorari.

POWER, in this Term, obtained a rule calling on the defendant to shew cause why the writ of certiorari in this prosecution should not be quashed, and the return made thereto taken off the file of this Court and sent back to the Sessions.

From the affidavit on which the rule was obtained, it appeared that, at a Quarter Sessions holden for *Suffolk* on 1st *February*, 1854, for the appointment of inspectors of weights and measures, under stat. 5 & 6 W. 4. c. 63., the Sessions appointed an inspector and four superintendents of police to be inspectors of weights and measures for four districts respectively. Nothing was contained in the order respecting salary. The order was afterwards removed by a writ of certiorari, obtained at Chambers, under the order of *Crompton J.*

Worlledge now shewed cause. The order is bad, for want of jurisdiction; and therefore, though sect. 36 enacts that no proceeding under the Act shall be removed by certiorari, the order will be quashed. By sect. 10 of

the Rural Police Act, 2 & 3 *Vict. c. 93.*, the superintendents of police are forbidden to employ themselves in any other way than under that Act. [*Wightman J.* That is "for hire or gain." In this case the appointments are not at a salary.] This is for hire or gain, because stat. 5 & 6 *W. 4. c. 63. s. 17.* makes it a duty of the justices to direct a remuneration to the inspectors whom they appoint. [*Crompton J.* If the justices appointed these superintendents without salary in order that they might fill up the time for which they were paid under the police Act, was that an act in excess of jurisdiction? The power to give a salary does not make it unlawful not to give a salary, if the person to whom it would be paid, if given at all, consents to act gratuitously.] The two appointments of the same person are illegal, because the duties are inconsistent. The inspectors must on certain days be at certain places; the superintendent may be required by the calls of that office to be elsewhere than at the particular place where, as inspector, he ought to be. Is he to neglect the duties of one of the two offices? [*Wightman J.* That surmise does not shew that the appointment was one which the justices had not jurisdiction to make.]

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Power and *Couch*, *contrà*, were not called on.

LORD CAMPBELL C. J. It is quite clear that this writ ought not to have issued. We should be exceeding our jurisdiction were we to interfere with the discretion of the justices in the matter.

WIGHTMAN and CROMPTON Js. (*a*) concurred.

(*a*) *Erle J.* was absent.

1854. *Power* applied for costs.

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LORD CAMPBELL C. J. We should have made the rule absolute without costs, were it not that the attention of my brother *Crompton*, to whom the application for this writ was made at Chambers, was not drawn to the section by which the certiorari is taken away.

Rule absolute with costs.

Thursday.
May 4th.

IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

FISHER against BRIDGES.

Action on a covenant to pay money. Plea, which the Court construed as meaning that there had been an illegal agreement that, for a price to be paid to the plaintiff, land should be sold and conveyed to defendant for an illegal object; that the land was conveyed to defendant for that object; and that afterwards the deed was executed to secure payment of the price.

THE pleadings in this case are stated at length in the report of the case below (a). The following abstract of the record is taken from the judgment of the Court of Exchequer Chamber, delivered in this case by *Jervis C. J.*

"The declaration states, in substance, that the defendant by his deed covenanted with the plaintiff, for himself, his heirs, &c., that he, the defendant, his heirs, &c., should and would well and truly pay to the plaintiff, his

Held by the Exchequer Chamber, reversing the judgment of the Queen's Bench, that the plea was good. For, the deed being given as a security for the payment of a debt tainted with illegality, the law, which would not enforce the payment of the debt, would not enforce the payment of the security.

(a) *Fisher v. Bridges*, 2 E. & B. 118.

executors, &c., the sum of 630*l.*, with interest on a day named.

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BARDGES.

The defendant pleaded, first, that, before the making of the deed in the declaration mentioned, it was unlawfully agreed, by and between the plaintiff and the defendant, that the plaintiff should sell &c. to the defendant, and that the defendant should purchase of the plaintiff, and accept from him a conveyance of, certain land &c., for the residue of a term, subject to a mortgage, at and for and in consideration of a certain sum of money, to be therefore paid by the defendant to the plaintiff, to the intent and for the purpose, as the plaintiff at the time of the making of the agreement well knew, that the land &c. should be exposed to sale and sold by way of lottery &c., contrary to the form of the statute; and further that, afterwards, in pursuance of the said illegal agreement, the said lands &c. were sold, transferred and assigned for the residue of the term, subject as aforesaid, and, a part of the purchase or consideration money, to be paid by the defendant to the plaintiff for the same, being unpaid, the defendant, to secure the payment thereof to the plaintiff, made the covenant in the declaration mentioned, the said 630*l.* being parcel of that money.

The second plea was in substance the same as the first, except that it states the sale to be colourable.

At the trial, the jury found the first plea for the defendant: and, the Court of Queen's Bench having given judgment for the plaintiff, non obstante veredicto, the defendant below brought this writ of error."

The case was now (a) argued.

(a) Before *Jervis C. J.*, *Pollock C. B.*, *Cresswell, Williams and Crowder* *Js.*, and *Parke, Platt and Martin B.*

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Hugh Hill, for the defendant below, in support of the suggestion of error. The original agreement, as disclosed on the plea, is in itself illegal; it is an agreement for the purpose that the lands may be exposed to sale and sold by way of lottery; which is rendered penal by stat. 12 G. 2. c. 28. s. 1. The contract itself therefore is void and cannot be enforced at law; *Bartlett v. Vinor* (a), *De Begnis v. Armistead* (b). It was not disputed below, and probably will not be disputed now, that the general principle is clear, that all things done in contravention of a statute are illegal. It is not material whether the thing forbidden is malum prohibitum or malum in se; in neither case will the law enforce an agreement the object of which is to transgress a statute; *Langton v. Hughes* (c), *The Gas Light and Coke Company v. Turner* (d), *Cannan v. Bryce* (e). But the Court of Queen's Bench, admitting that no action would have lain on the agreement, decided that an action lay on this instrument under seal, inasmuch as a deed requires no consideration. The error lay in construing this plea as merely shewing no consideration; when rightly construed, it shews that there was a consideration, and that it was an illegal one. First: the language of the plea shews that the bond was given as part of the machinery for carrying out the illegal purpose. If it may bear that meaning, and it is necessary to make it a good plea, it should, after verdict, be so construed. Similar averments have been construed in this way; *Lightfoot v. Tenant* (g), *Paxton v. Popham* (h).

(a) *Carth.* 251.(b) 10 *Bing.* 107. See *Pidgeon v. Burslem*, 3 *Exch.* 465.(c) 1 *M. & S.* 593.(d) 5 *New Ca.* 666.(e) 3 *B. & Ald.* 179.(g) 1 *B. & P.* 551.(h) 9 *East*, 408.

But, even if it was not part of the original scheme that a bond should be given for the price, yet, if it appears that the bond was given, not gratuitously, but to secure the fulfilment of an illegal agreement, the law will not lend its assistance to enforce the security, as it would not have enforced the debt. That makes the distinction between the present case and those of bonds given in consideration of past cohabitation. In such cases there is no consideration at all; a promise to pay is void, not as being illegal, but as nudum pactum; *Beaumont v. Reeve* (a). But here was a complete consideration for the original agreement; and assumpsit would have lain to enforce the payment of the money had not that agreement been illegal.

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Willes, contra. The greater part of the principles laid down on the other side are admitted: yet the plea is bad, and the judgment below correct. A deed requires no consideration to support it; and therefore the plea is not good unless it shews the deed was given for an illegal consideration. No question can arise as to the sufficiency of the consideration: the plea must affirmatively shew that the consideration was bad. Now, though it was illegal to agree to purchase land for the purpose of selling it by lottery, and though it was illegal to sell the land by lottery, yet, after the land had been conveyed to the purchaser by the vendor, it was the moral duty of the purchaser to pay the price. It is not a duty which the law would enforce: but, after one party has suffered prejudice, and the other party has obtained benefit, it is, at least, not wrong or wicked to

(a) 8 Q. B. 483.

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make compensation. It is as proper to pay for an estate previously obtained by an antecedent illegal bargain as to pay compensation to a woman for past seduction. In *Barnes v. Hedley* (a) the Court of Common Pleas held that a promise to repay, with legal interest, a sum previously lent on usurious terms was binding. The cases now shew that such a moral obligation to pay is not a sufficient consideration; but, to support this plea, it must be made out that the compliance with such a moral obligation is illegal. It is said that after verdict the plea is to be understood in the sense that will make it good; but the intentions, to be made after verdict, must be consistent with the language of the plea. The language shews that "in pursuance" of the agreement the lands were sold; but then it changes, adding, "and, a part of the said purchase or consideration money to be paid by the defendant to the plaintiff for the same being unpaid." That was not in pursuance of the agreement but in breach of it. [*Parke* B. I doubt whether that is the right construction, after verdict. But suppose it to be so. It is true that a bond given in consideration of bygone seduction is not invalid. But, if a bond were, after seduction, given to secure the price promised before hand, would that be valid?] Yes, unless it was part of the previous bargain that such a security should be given: the securing the payment would be but an act of common honesty. But in the present case it is not even shewn that the agreement was illegal. It is only said that the purchaser intended to sell the land by lottery "as the plaintiff at the time of the making the said agreement well knew." But it

(a) 2 Taunt. 184.

is not enough that the vendor knew that the purchaser intended to make an illegal use of the thing sold: the plea ought to have shewn that the vendor intended it also; *Pellecat v. Angell* (a). The whole of the cases on illegality are collected in *Chitty on Contracts*, 4th ed. 570., and note (b) to *Rex v. Kilderby* (b). No case shews that a bond, voluntarily given, after the illegality is over, to secure payment for what had been actually, though improperly, enjoyed, is illegal.

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H. Hill, in reply. The averments shewing the illegality of the agreement go further than the facts in *Langton v. Hughes* (c). And, as the agreement must be understood as having been to pay the price, or do something equivalent to payment, the giving a bond was in pursuance of the agreement.

Cur. adv. vult.

JERVIS C. J., on a subsequent day in this Term (May 10), delivered judgment.

This is a writ of error from the Court of Queen's Bench. (After stating the pleadings as ante, p. 642, his Lordship proceeded.)

The first question is, What is the meaning of the plea? It was said in the argument that it did not sufficiently affect the plaintiff with a participation in the intent and purpose of ultimately selling the land &c. by lottery, because the interposition of the words "as the plaintiff at the time of the making of the said agreement well knew" shewed that the plaintiff merely knew of the

(a) 2 C. M. & R. 311.

(b) 1 Wms. Saund. 309. See *Collins v. Blantern*, 2 Wils. 341, and note to that case in 1 Smith's Lea. Ca. 168.

(c) 1 M. & S. 593.

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intent. But we think that the plea cannot be so read. After verdict every fair intendment must be made in favour of the plea, giving full effect to all the words used: and, finding, as we do in the plea, a distinct averment that the agreement between the plaintiff and the defendant for the sale was to the intent and for the purpose of the future lottery, we cannot qualify that allegation so as to make the plea bad, merely because it is added, perhaps unnecessarily, that the plaintiff knew of that intent.

It was also said in the argument, and this point formed the basis of the judgment of the Court below, that it did not appear that the covenant was given in pursuance of the agreement or was connected with it. Perhaps, if it were necessary to make the plea good, it might after verdict be taken to mean that the lands were sold and transferred in pursuance of the agreement, and also, the consideration money being in part unpaid, that the covenant was given in pursuance of the agreement. But according to the view we take of this case it is not necessary that the plea should be so understood. It clearly shews that the covenant was given to secure the payment of a part of the purchase or consideration money for the lands the subject of the agreement.

Upon the record so framed, and so understood, in our opinion the plaintiff in error is entitled to judgment: and we therefore think that the judgment of the Court below must be reversed.

It is not denied that the original agreement was tainted with illegality. All lotteries are prohibited by stat. 10 & 11 W. 3. c. 17. s. 1.: and, by stat. 12 G. 2. c. 28. s. 4., all sales of houses, lands, &c. by lottery are declared to be void to all intents and purposes.

The agreement, being illegal, could not be enforced;

and no action could be brought for the recovery of the purchase money of the lands the subject matter of the illegal agreement. This was conceded in the Court below; it was not denied in the course of the argument before us; and, if necessary, might be established by many authorities. But it is said that the covenant may be good, and may be enforced at law, even though the original agreement were illegal and the purchase money not recoverable, by reason of that illegality, if it had not been secured by an instrument under seal. It is certainly true that for a bond, or other instrument under seal, no consideration is necessary; but it does not therefore follow that every such instrument may be enforced by an action. The authorities cited in the argument shew that, where the bond or other instrument is connected with the illegal agreement, it cannot be enforced; *Lightfoot v. Tenant (a)*, *Paxton v. Popham (b)*, *The Gas Light and Coke Company v. Turner (c)*: and therefore, if this plea alleges that the covenant was given in pursuance of the illegal agreement, it would upon these authorities be an answer to the action.

But, if it is not so understood, we think it shews a good defence. It is clear that the covenant was given for payment of the purchase money. It springs from, and is a creature of, the illegal agreement; and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase money, which by the original bargain was tainted with illegality.

The case of *Beaumont v. Reeve (d)*, much relied upon

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(a) 1 B. & P. 551.
(c) 5 New Ca. 666.

(b) 9 East, 408.
(d) 8 Q. B. 483.

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in the Court below, does not in our judgment affect the question. It is clear that past cohabitation and previous seduction are not good considerations for a parol promise; but they are not therefore illegal considerations. They are no considerations at all: and, inasmuch as a bond, or other instrument under seal, is good without any consideration, it by no means follows that a covenant, to pay a sum of money tainted with illegality, can be enforced merely because a bond for maintenance, founded upon past cohabitation or previous seduction, is good. If an agreement had been made to pay a sum of money in consideration of future cohabitation, and, after cohabitation, the money being unpaid, a bond had been given to secure that money, that would be the same case as this; and such a bond could not under such circumstances be enforced.

For these reasons we are of opinion that the judgment must be reversed.

Judgment reversed.

Friday.
May 5th.

JOHN FAGG *against* JOSEPH NUDD.

Under sect. 91
of The Com-
mon Law Pro-
cedure Act,
1852, a count
for money
found to be
due from the
defendant to
the plaintiff
on accounts

PLAINTIFF sued defendant on a promissory note, for interest, "and also for money found to be due from the said defendant to the said plaintiff on accounts stated between them." Demurrer to the third count. Joinder.

stated between them is sufficient, though it omits the words "for money payable by the defendant to the plaintiff for" contained in the form given in Schedule (B.).

Morgan Lloyd, for the defendant. The absence of the words "For money payable by the defendant to the plaintiff" is fatal; *Place v. Potts* (a).

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Raymond, contrà, was not called upon.

Lord CAMPBELL C. J. The count demurred to, in substance, follows the form given in Schedule (B.) to the Common Law Procedure Act, 1852: and I am of opinion that, if we were to decide in favour of this demurrer, we should contravene the clearly expressed intention of the Legislature. Objections such as the present had often prevailed; and it was thought not creditable to the administration of justice that they should prevail: to avoid them in future the Legislature gave forms which it declared should be sufficient: but, by sect. 91, it carefully provided that no deviation from those forms should be injurious so long as the substance was preserved. The Legislature most anxiously goes on to declare that "nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity." Prolixity seems to have been the evil dreaded; nothing concise is bad if it indicates the substance. The form given in Schedule (B.) is in the present case followed in all other respects; but the words "Money payable by the defendant to the plaintiff for" are omitted. If the effect of this omission could be to mislead, if the defendant would not have as much information from the form adopted as from the form in the Act, there would be some ground of complaint.

(a) 8 *Exch.* 705.

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But it cannot be doubted that the defendant has every information; and the substance of the statutory form is expressed. The omission is only to state that the money was payable: but that the law implies from its being found due on an account stated.

WIGHTMAN J. If the Act had prescribed a form which was to be followed in all cases, it might be that any deviation from it would hurt: but here the Legislature has carefully provided that no deviation from the form shall be erroneous or irregular, "so long as the substance is expressed without prolixity." I find it difficult to see how money can be found due on an account stated without being payable; so that I think that the substance is expressed.

CROMPTON J. (a). From money being found due on accounts stated the law implies a promise to pay it.

Judgment for the plaintiff.

(a) No fourth Judge was present this day.

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IN THE EXCHEQUER CHAMBER.

(Error from the Queen's Bench.)

The Mayor, Aldermen, and Burgesses of the
Borough of BERWICK UPON TWEED *against*
JAMES JEFFRIES OSWALD.

THE plaintiffs in this action having obtained a verdict on all the issues in fact, and the Court of Queen's Bench having given judgment in their favour on the demurrers to two pleas, the sixth and seventh, final judgment was signed for 2161*l.* 18*s.* The defendant suggested error.

The declaration and the pleas which led to issues in law are fully stated in the report of the case below (a).

borough, defendant became surety to the Corporation for *D.*'s accounting to them "during the whole time of *D.* continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office." Averments that, by subsequent elections, *D.* was continued in his office and did not account.

Plea: that *D.* was elected to the office, and the deed given, whilst the office was annual under stat. 5 & 6 *W. 4. c. 76. s. 58.*; that, on 9th November 1843, *D.* was, in obedience to stat. 6 & 7 *Vict. c. 89. s. 6.*, elected to the office during pleasure; and that he accounted up to 9th November 1843. On demurrer, the Court of Queen's Bench gave judgment for the plaintiffs. Error being suggested,

Held by *Cresswell* and *Williams* Js., and *Parke*, *Alderson* and *Martin* Bs., affirming the judgment below, that, the functions and duties of the office not being changed, it continued the same office; and that the change in the tenure was provided for by the language of the deed, and therefore did not discharge the sureties.

Dissentientibus *Jervis* C. J., *Pollock* C. B. and *Maule* J., on the grounds that the parties to the instrument should be presumed to be contracting on the supposition that the existing law should continue to exist; that there were no words to shew that the parties intended to be bound in case the tenure of the office was changed; and that, the risk of the sureties being affected by the change in the tenure, the office did not remain the same within the meaning of the security deed.

Judgment affirmed.

(a) *Mayor of Berwick v. Oswald*, 1 *E. & B.* 295. (where, in the first line of the marginal note, for "by" read "with.").

Covenant with the Mayor &c. of the borough of *B.* on a deed, executed after stat. 5 & 6 *W. 4. c. 76.* and before stat. 6 & 7 *Vict. c. 89.*, by which, after reciting that the council of the borough had elected *D.* treasurer of the

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The following abstract of the pleadings is taken from the judgment of *Martin B.* in the Exchequer Chamber.

“The declaration was upon a deed, dated the 15th of *January* 1842, which recited that, at meetings of the Town Council of the Borough and town of *Berwick upon Tweed*, held on the 21st of *December* 1841 and 11th *January* 1842, certain resolutions were agreed to relative to the office of treasurer of the borough, and, amongst them, that the treasurer should find securities for the due execution of his office in the sum of 2000*l.*; and that, at one of these meetings, a person named *Murray* had been elected the treasurer. The deed then proceeded to state that the said *Murray*, and the defendant, and certain other persons, as cautioners, sureties and full debtors, with *Murray*, bound themselves jointly and severally to the plaintiffs, to pay to them all sums of money which *Murray* should receive “in virtue of” his “said appointment as treasurer as aforesaid, during the whole time of” his “continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office.” The deed then proceeds to provide for the due execution by *Murray* of his said office, and for his attention to its duties during his continuance in office, and limited the liability by reason of it to 2000*l.* The declaration then alleged that *Murray* became treasurer by virtue of the election mentioned in the deed; and that, by virtue of an election made on the 9th *November* 1842 and other subsequent elections, he continued treasurer until the 24th of *June* 1848: that he received various sums of money by virtue of his office; and, for a breach, alleged that he had not paid these moneys to the plaintiffs. To this declaration, there were several

pleas; to two of them (the 6th and 7th) there were demurrers. Upon the argument, the 7th was abandoned by the learned counsel for the plaintiff in error: and the only question argued before us was the validity of the 6th plea.

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“The 6th plea stated, that the election of *Murray* to be treasurer as mentioned in the deed, and also his election on the 9th *November* 1842, were made under and in pursuance of the stat. 5 & 6 *W.* 4. c. 76., The Municipal Corporation Act; and that, on the 9th *November* 1843, he ceased to be treasurer under and by virtue of either of these elections. That, on the 9th *November* 1843, in pursuance of stat. 6 & 7 *Vict.* c. 89., he was elected by the town council to be treasurer, to hold the office during their pleasure. That, after the 9th *November* 1843, he never held the office of treasurer save under the election made in pursuance of the statute last mentioned; and that he had duly accounted for all money received by him prior to the 9th *November* 1843, or under or by virtue of his office as treasurer under his elections in pursuance of stat. 5 & 6 *W.* 4. c. 76.; and that the money mentioned in the breach was received by him, after the 9th *November* 1843, and after his election under stat. 6 & 7 *Vict.* c. 89.”

The case in error was argued in last *Hilary* Term (a).

Unthank, for the defendant, in support of the suggestion of error. The seventh plea cannot be supported; and the argument will be confined to the sixth plea, which raises two points. First: whether the bond is so worded as to make the sureties liable for the conduct of *David*

(a) *Thursday*, January 19; before *Jervis C. J.*, *Pollock C. B.*, *Maule*, *Cresswell* and *Williams Js.*, and *Parke*, *Alderson* and *Martin Bs.*

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Murray after the first year of his continuance in office.

At the time when the bond was executed, stat. 5 & 6 *W.* 4. c. 76. s. 58. was in force; and, under it, a treasurer was necessarily appointed in every year. The condition of a bond, for the good behaviour of one holding an annual office, is, *prima facie* at least, confined to the first year, though express words may be added to shew that it applies beyond that time. General words are not sufficient to rebut this presumption; *Lord Arlington v. Merricke* (a), *Liverpool Waterworks Company v. Atkinson* (b). Secondly: the change in the law introduced by stat. 6 & 7 *Vict.* c. 89. s. 6. has substantially altered the nature of the risk incurred by the sureties; and there are no words in the bond to shew that the sureties undertook to be responsible for this altered risk. The words "any annual or other future election" had a sensible meaning as applied to the state of law existing at the time they were used, as stat. 5 & 6 *W.* 4. c. 76. s. 58. did not require that the treasurer should be elected for an entire year. The council are by that Act bound to elect in each year; but they may elect more than once in the year; and, if they did so, the election would be other than an annual election. Then the change introduced by stat. 6 & 7 *Vict.* c. 89. s. 6. alters the risk. Before that Act a treasurer went out of office at the end of the year unless the majority of the council were willing to take the active step of reelecting him. Now, he continues in office, unless the majority are willing to take the active and probably invidious step of turning him out: that surely increases the probability of an unfit treasurer being continued, and so increases the risk of his sureties.

(a) 2 *Saun.* 403.

(b) 6 *East*, 507.

The bargain was made under one state of the law, and does not apply to an altered state of law.

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Manisty, *contra*. The words used in this bond shew that the parties intended to be answerable so long as *D. Murray* held the office continuously. The class of cases commencing with *Lord Arlington v. Merricke* (a) does not apply when such an intention is shewn; *Augero v. Keen* (b), *Frank v. Edwards* (c). [*Alderson B.* In that last case the appointment to the office was by two justices of the peace under stat. 59 G. 3. c. 12. s. 7., and the appointment had neither been revoked by the vestry, nor resigned by the officer. If you look at the Act you will see that these facts were very material to the decision.] In all cases of this kind it must be a question of construction; here the context shews that "office" meant "treasurership." And the change of the tenure in the office has not altered the nature of the office.

Unthank was heard in reply.

Cur. adv. vult.

There being a difference of opinion on the Bench, the Judges, in this Term (*May* 10), delivered separate judgments.

MARTIN B. This was a writ of error upon a judgment of the Court of Queen's Bench. (After stating the pleadings as ante p. 654, his Lordship proceeded.)

Martin B.

(a) 2 *Saun.* 403.

(b) 1 *M. & W.* 390.

(c) 8 *Exch.* 214.

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Martin B.

The arguments and judgment in the Court below are reported in 1 *E. & B.* 295.: and that Court was of opinion that the plea was bad, and gave judgment for the plaintiffs below. I am of opinion that this judgment was right, and that it ought to be affirmed.

By stat. 5 & 6 *W. 4. c. 76. s. 58.* it was enacted that the council of every borough should *in every year* appoint a fit person, not being a member of the council, to be the treasurer of the borough, and that they should take such security for the due execution by him of his office as they should think proper. This was the enactment which was in force when *Murray* was first elected treasurer, and continued to be so at the time of his second election in *November 1842.* Stat. 6 & 7 *Vict. c. 89.* received the Royal Assent on the 24th *August 1843:* and by the 6th section, after reciting that the office of treasurer for boroughs was one of great trust, and that an annual appointment to such office was inconvenient and unnecessary, it was enacted that so much of stat. 5 & 6 *W. 4. c. 76.* as enacted that the town council should *in every year* appoint a treasurer should be repealed, and that the council of every borough should, on the 9th *November* then next, appoint a fit person, not being a member of the council, to be the treasurer of the borough, who should thenceforth hold his office *during the pleasure of the council for the time being.*

The plea averred that *Murray* was elected treasurer on the 9th *November 1843,* under and in pursuance of the last mentioned statute: and the argument on behalf of the plaintiff in error was, that this was not an election within the true meaning of the deed declared on, so as to render the defendant, who was a surety, liable for

the non-payment by *Murray* of the money received by him under or by virtue of his office, created by, or consequent upon, such last election.

There is no doubt as to the rule of law to be applied to cases like the present. It was laid down in *Lord Arlington v. Merricke* (a), and has been professed to be adhered to ever since. If the deed declared on had recited the election of *Murray* in the beginning of 1842, as being under stat. 5 & 6 W. 4. c. 76., and been generally for the due payment by *Murray* of all money received by him during his holding the office of treasurer, then, according to the rule laid down in the above case, the obligation created by the deed would not have extended to any money received by *Murray* after the 9th November 1842: but it was quite competent for the town council, by using apt words for the purpose, to take a security creating an obligation upon the surety to secure the due payment by *Murray* of all moneys received by him as treasurer, so long as he should be elected to and hold the office. There is nothing illegal in the town council taking such continuing security: and the real and only question in the present case is, Whether they have done so by the deed declared on. It is my opinion that they have. I apprehend there could have been no doubt that, if the election had continued to be annual, the obligation created by the deed would also have continued. The words of the deed are express, that the liability of the defendant should continue during the whole term of *Murray's* continuing to fill the office in consequence of the then late election or under any annual future election. These words seem to be as precise and clear as words can be. By stat. 6 & 7 Vict. c. 89., however, the elec-

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(a) 2 *Saund.* 403.

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tion and office ceased to be annual, and the office became one to be held at the pleasure of the town council. The office however remained the same, with all its duties and emoluments unaltered; and the only alteration made was that, instead of being an annual office, it became one from which *Murray* was removeable at the pleasure of the council. I fully agree that, if any additional or increased risk would have been thereby cast upon the defendant (the surety), his liability would have been determined; but in my opinion no such additional or increased risk was created. On the contrary, assuming the town council to do their duty (and I have no right to assume that they would not), I think it was an alteration much to the advantage of the surety, by giving the council a more direct and immediate controul over the principal (*Murray*). So also, if it could be collected from the terms of the deed that the liability of the surety was to be conditional upon *Murray* holding an annual office, the responsibility would have ended on the 9th *November* 1843, and the plea would have been good; but no such intention is to be collected from the terms of the instrument. Indeed, if it had appeared that the consideration for the covenant by the defendant was to have been the continued appointment of *Murray* to the annual office, I should have thought that the liability was determined; but nothing of the kind appears from the statement of the deed as set out on the pleadings.

The only question therefore, as it seems to me, is, Does the case fall within the words of the deed? This instrument provides, not merely that the defendant should be answerable for the due payment by *Murray* of all money received by him in consequence of his first or any other *annual election*, but in consequence or by

reason of any other *future election* of him. Now *Murray* has been elected treasurer by a future election, not an annual one; and the case therefore falls directly within the words of the deed. In my opinion, also, it falls within its spirit; which I think was, that the defendant should continue a security so long as and (as the deed itself expresses) during the whole time *Murray* remained treasurer of the borough, and whether his election was annual or otherwise. I therefore see no reason why full effect should not be given to the words of the deed. My judgment is in accordance with what I consider to be the true rule of law in regard to the construction of every written contract, viz. to give effect to the plain and ordinary meaning of the words and language used, according to their common sense and signification, as they would be understood by a person of intelligence reading the document.

For these reasons I think the judgment of the Queen's Bench ought to be affirmed.

WILLIAMS J. I am of opinion that the judgment ought to be affirmed. With respect to the seventh plea, there is, I believe, no difference in opinion among the Judges; and I shall therefore say nothing. With respect to the sixth plea, I think the judgment of the Court of Queen's Bench is right. The intention appears to me to be clear, from the language of the condition of the bond, that the council should take, prospectively, a security for the good conduct of the treasurer, as long as he continued in the office in consequence of the recent or any future election by the council, for any period or tenure whatever. The language "during the whole time of my continuing in the said office, in con-

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1854. sequence of the said election, or under any annual *or*
 Mayor of *other* future election," admits of no other interpretation,
 BERWICK as it seems to me, if construed in its ordinary accepta-
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Williams J.

The question then is, Whether such a construction is inconsistent with any declared intention of the parties to be collected from the recital or any other part of the instrument. In *Lord Arlington v. Merricke (a)*, and the long series of cases of which that is the leading one, the intention was regarded as apparent in the recital, that the suretyship was to last for a certain time only; and, as this was inconsistent with the general words used in the condition, if construed indefinitely, it was allowed to control them by confining their generality within the limits, expressed, or necessarily to be implied, in the recital. But in the present case, looking at the whole instrument, it is plain, in my judgment, that the apparent intention of the parties is carried into effect by construing the words of the condition according to their ordinary acceptance. And, if this be so, even if it could be shewn (which I by no means concede) that the liability of the sureties has been increased by the reelection *durante bene placito* under stat. 6 & 7 *Vict. c. 89.*, it is plain that this would not justify the Court in relieving them from their responsibility.

Cresswell J.

CRESSWELL J (*a*). This question depends upon the meaning to be given to the condition of the bond executed on the original appointment of *David Murray* to the office of treasurer of the borough of *Berwick on Tweed*. The condition is that *Murray* and his sureties

(*a*) 2 *Saund.* 403.

(*b*) *Alderson B.* read this judgment in the absence of *Cresswell J.*

are bound for the due payment of all moneys which "the said *David Murray* shall or may recover or receive, in virtue of my *said appointment as treasurer* as aforesaid, *during the whole time of my continuing* in the said office, in consequence of the said election, or under any *annual* or *other future* election of the said council to the said office." After some annual reelections under stat. 5 & 6 *W. 4. c. 76.*, he was reelected, on *November 9, 1843*, under stat. 6 & 7 *Vict. c. 89.*, to hold the said office during the pleasure of the council: and the question is, Whether that was a reelection within the meaning of the condition of the bond. The condition requires that the money to be accounted for should be received "in virtue of my *said appointment as treasurer.*" That relates to the nature of the office. It remained precisely the same after the passing of the statute of *Victoria*. The money now claimed was therefore received in virtue of his said appointment as treasurer. Each of the reelections of *Murray* was immediate on the termination of the period for which he had been previously elected: his tenure of office was therefore continuous; and the money was received while he *continued* in the said office of treasurer. But he did not continue in office under any annual election; he was in under another election under stat. 6 & 7 *Vict. c. 89.*: and the question is whether that was another future election, within the meaning of the condition of the bond. It has been contended that, as an election to hold during pleasure could not have been made when the bond was executed, such election being first sanctioned by stat. 6 & 7 *Vict. c. 89.*, it could not have been within the meaning of the parties; but it is to be remarked that under stat. 5 & 6 *W. 4. c. 76. s. 58.*

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Cresswell J.

1854. the council could only elect annually, or on a vacancy
 occasioned by death, resignation, removal or otherwise :
 Mayor of ~~and then another person was to be elected ; so that the~~
 Braintree ~~same person could only be reelected by an annual elec-~~
 v. ~~tion, and the word "other" was inapplicable to any~~
 Oswald. ~~reelection under that statute. Bearing this in mind,~~
 Council J. ~~and that the words are large enough to include a~~
~~reelection, whether under the statute then in force, or~~
~~any other that might be enacted, and that the manifest~~
~~object of the parties was to avoid the necessity of giving~~
~~fresh bonds on every reelection, I think we cannot do~~
~~otherwise than hold that the reelection under stat.~~
~~6 & 7 Vict. c. 89. was another future election within the~~
~~meaning of the condition of the bond.~~

It is said that the risk of the sureties will be increased. That is a mere conjecture. On the one hand, parties may be unwilling to remove a party although they would not vote for his reelection : but, on the other, it may be said that a treasurer elected for a year cannot be removed without proof of misconduct ; if during pleasure, any suspicion as to his habits may be sufficient to procure his removal for the protection of his sureties. This argument therefore leads to no certain conclusion ; and I think we must hold that the election during pleasure was an election within the meaning of the condition, and that our judgment must be for the plaintiffs, and that the judgment of the Queen's Bench is right.

Maule J. MAULE J. I agree with my brother *Martin* as to what the question raised by this record is, namely : Whether the sureties continue liable under the circumstances disclosed in the sixth plea ? It appears to me

that they do not so continue liable, and, consequently, that the judgment of the Court of Queen's Bench ought to be reversed.

The words of the bond are that the liability shall be for the due payment of such sums as the said *D. Murray* "shall or may recover or receive, in virtue of my said appointment as treasurer as aforesaid, during the whole time of my continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office." It is clear that the intention of the parties was that the liability should not be limited to the first year. The language puts it beyond doubt that they contemplated liability during a continuance in office beyond that year. But I think that these parties, and people in general, must always be considered as contracting with reference to the law as existing at the time of the contract. I by no means affirm or think that there is any thing to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law. Supposing that the parties to this bond had contemplated that some alterations might be made by law in the office of treasurer, there would have been nothing illegal in the sureties binding themselves to be answerable though the nature, and tenure, and duties of the office were changed: but in general sureties are to be presumed to be contracting on the supposition that the law will remain such as it is, and the office continue to be of the same quality and the same duration; and the words, shewing a contrary intention, ought to be pretty clear to rebut that presumption. One reason for that presumption is that it would be very indiscreet to contract

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with reference to any other state of law. I think a discreet person would be very unlikely to enter into a contract that, notwithstanding any alterations which might be made with respect to the office of treasurer, his liability as surety should continue. Even if you were to add a qualification that the liability should only continue, provided that alteration in the office did not increase the risk of the sureties, I think any discreet and prudent person would say: "Let me judge of that for myself. Let me see the Act of Parliament which is to alter the nature and tenure of the office; and let me then judge: I will not now leave it to others to judge, whether the liability of surety for an officer so appointed is such as I choose to continue. I now go no further than to say that as long as the office is on its present footing I am content to be surety." I think no discreet or prudent person would bind himself further: but, if, for some consideration, he did think fit to bind himself notwithstanding any changes in the law, I think he certainly would express that intention by some other means than by an inference to be drawn from the use of the single word "other."

For some purposes the office may continue the same office notwithstanding a change in its tenure, if the nature and functions remain unaltered, as was said in the judgment below: but for the purpose of construing this deed I think it cannot be justly affirmed that the office remains the same. For, the main object of the deed being to give security for the conduct of the officer, the office does not remain the same, in the point of view in which it would be contemplated by the parties to the deed, if, though the duties and functions of the office continue the same, the risk and liability of the

sureties do not remain the same. And it appears to me very clearly that the alteration made by stat. 6 & 7 *Vict. c. 89. s. 6.* does materially increase the risk of the sureties, and does, in that point of view, change the office. Under stat. 5 & 6 *W. 4. c. 76. s. 58.* the town council were "in every year" to appoint a person to be treasurer. Therefore a treasurer could not continue in office longer than till some time in the next year after his election, which I call not more than a year, unless a majority of the council thought fit, by a positive act, to appoint him again in the ensuing year. Unless they did that positive act he would cease to be treasurer, and the sureties would cease to be liable. But the alteration made by stat. 6 & 7 *Vict. c. 89. s. 6.* is, that the treasurer holds his office during pleasure, so that, when once appointed, the treasurer continues to hold his office for life, unless a majority of the council can make up their minds to meet and do the positive act of removing him. Now, when there is a doubt whether a person is fit for his office, or when it is held by a person, perhaps deservedly beloved and respected in his private capacity by the members of the council, but who has shewn himself not fit for it, any one can see that this change makes a great practical difference. Many persons who could not bring themselves to a positive vote for removing him, as required since stat. 6 & 7 *Vict. c. 89.*, would yet, if they were called upon, as they were under stat. 5 & 6 *W. 4. c. 76.*, once a year, to declare by their votes that he was a fit person to be appointed, refrain from doing so; so that it seems to me there is a substantial alteration in the risk of the sureties. This view of the case was not apparently pressed in argument below: it certainly was not con-

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sidered in the judgment of the Court of Queen's Bench.

But the reasoning in the judgment seems to lead to the conclusion that the Court thought that, if the tenure was altered ever so much, if the statute had said the treasurer should in future hold during good behaviour, so as to hold the office for life, not removeable at all, yet if the duties remain the same it is the same office. I think the principle of the judgment must lead those who affirm it to say that even in such a case the sureties would remain liable. But, as I have already said, though the office for some purposes remains the same, yet it does not remain the same for the purposes of this bond, if the change affects the risk of the sureties. And I think that the change, which took place before the transactions for which it is sought to make the sureties liable, did materially alter the risk of the sureties, and was therefore one in respect of which they were very unlikely, if actuated by reasonable principles, to have intended to contract. The main, I may say the sole, argument used in support of construing the deed as shewing an intention to be bound in the event of alterations being made by Act of Parliament, is that the word "other" is not satisfied unless you give it the employment of affording an inference that the parties so intended. Otherwise, it is said, it is an idle word. Now, if that were so, I do not think it a *reductio ad absurdum* that either the sense is so and so, or that a word used in an instrument is superfluous. It constantly happens in deeds, both in the *Scotch* and in the *English* form, that superfluous words are used. The draftsman often wishes to provide for some event which has occurred to him; he will not take the trouble to consider carefully whether the event is possible or not,

but puts in words to make sure, in case it happens, thinking that, at the worst, they are superfluous, and will do no harm. But it will be by no means safe to do so in future, if, rather than let a word be superfluous, you are to give it the effect of affording an inference that the parties intended to bind themselves with respect to the conduct of an officer to be appointed they did not know how, and possibly to an office with duties that might be they knew not what; for, though it may be true enough that a change in the duties would prevent it from continuing to be "the said office," no person who had it in his contemplation to be bound if there was an alteration in the tenure, but not if the alteration was in the duties, would leave that to an inference to be drawn from the word "said." I say it is much more likely that the parties would use a word such as "other" without distinctly knowing what they meant by it, so that it might be an idle word, than that they would use it for the purpose of shewing such an intention as that. But, further, I think it easy to find ample employment for this word "other," without giving it such extravagant work to do. Stat. 5 & 6 W. 4. c. 76. s. 58. does not say that the treasurer shall be elected on any particular day, but "in every year." Now, suppose a treasurer to be elected in the ensuing year on a day a few days earlier, or a few days later, than the day on which he was elected in the year before, so that he held office under the last election, in the one case for a little less, and in the other for a little more, than a year. Might it not be said that was not an "annual" election? Quibbles not less desperate have succeeded at times: and, if the draftsman thought of that, he very properly provided for it by using the words "annual or other future election:" so that if the

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1854. quibble was raised it might be answered. Or perhaps
 Mayor of the draftsman thought the statute might be construed as
 BERWICK requiring the election to be on the 9th day of *November*
 v. in every year, and was thinking of the possibility of
 OSWALD. the day having slipped by. You may in such a case
 Maule J. supply it by a mandamus to elect: but, though the
 Court may order an election nunc pro tunc, it is beyond
 the power of the Courts, or of an Act of Parliament, to
 recall a day that has passed, or make a thing which has
 happened not have happened.

Non tamen irritum

Quodcunque retro est efficiet (a).

That according to the writer is beyond the power of Omnipotence itself. The draftsman might think that, in such a case, if the sureties said "We are not responsible, for it is not an annual election," it would be a good answer, "You said annual or other election." The bond does not commence, as in former days it probably would have done, by reciting the mode by which the officer was under the then statute law to be appointed. It assumes that to be known; and, as there may be annual appointments or others not strictly annual, there is a fit and proper use for the word "other." It seems to me that the construction put upon the instrument in the Court below subjects the sureties to liability in an event which they are not likely to have contemplated, and a liability which it is not reasonable to suppose they would have intended to incur if they had contemplated it; and that, if they had intended to incur it, they would not have expressed such an intention merely by an inference to be drawn from the use of the word "other."

I think therefore the judgment ought to be reversed.

(a) *Hor. III. Carm. 29. 45.*

ALDERSON B. This question arises on the true construction of a covenant in a bond, under which plaintiff in error became surety, with another person, for the due accounting of one *D. Murray* who had been elected treasurer of the town of *Berwick*.

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The deed, after reciting *Murray's* election to that office, provided that the sureties should pay all moneys received by *Murray* by virtue of his appointment as treasurer during the whole time of his continuance in that office, in consequence of the said election, or under any annual or other future election.

Now, what is the contract here? In the first place it is a contract to answer for *Murray*, only during his continuance in office, though, it is true, under successive elections. If, therefore, he ceased to be continuously re-elected, the liability of the surety was at an end. In the second place, the office was at the time of the covenant described as an annual office; and therefore, according to the case of *Lord Arlington v. Merricke* (a), the covenant would, if it stopped there, bind the sureties only for the first year, and would cease to bind after the termination of that year. But, according to what is admitted in the case of *Liverpool Waterworks Company v. Atkinson* (b), it is clear that a larger responsibility may be created by the words of the covenant if their proper and reasonable construction would warrant it. Now here the words added are "or under any annual or other future election." These therefore embrace two cases, beyond the first annual election, for which in the first place the sureties bound themselves. They divide them-

(a) 2 Saun. 403.

(b) 6 East, 507.

1854. selves into two branches: "under any annual or"

Mayor of "future election," which would extend their liability to
BERWICK all other annual elections under which he might become
v. treasurer thereafter; and, in the second place, the words
OSWALD. are "under any other future election." Now, as I think,
Alderson B. the natural meaning of these words is "any future
election other than annual," or "whether annual or
not." The necessity for the elections being continuous
seems to me a strong reason for holding this to be so.
For a vacating of the office in the middle of any year,
followed by a reelection immediately of the same per-
son, seems a contingency, not at all reasonable to
calculate upon, as a ground for not giving to the words
"or other future election" their ordinary and natural
meaning. But, then, it is clear that the duties of the
office and the mode of accounting must not be varied.
For, if so, the office is not the same, and the liability of
the surety then also will be at an end; the clause in the
deed only provides for an alteration in the tenure of the
office, but not in the nature and duties of the office
itself. Now to apply all this to the present case. By
stat. 5 & 6 W. 4. c. 76. the office was made annual, and
the duties defined. By stat. 6 & 7 Vict. c. 89. the
duties remained unaltered, but the office was to be
elected to during pleasure. No alteration was therefore
made except as to the period of holding it; and this
alteration seems to me provided for by the very terms of
the covenant. Nor do I see that the liability of the
surety is increased. It is said that it is one thing not to
reelect and another thing to remove. But then, per
contra, a new power of removal is given at any inter-
mediate time, and is not confined to the expiration of
the annual period alone. This argument operates as well

therefore for one side as for the other. Here then I think that there is no reason why we should construe the words otherwise than according to their plain and natural import: and, if we do so, then the sureties still remain liable.

The judgment of the Queen's Bench is therefore right, and should be affirmed.

PARKE B. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. The pleadings have already been adverted to sufficiently. In the argument before us it is conceded that the objection to the seventh plea was valid, and that the judgment of the Court of Queen's Bench could not be questioned in that respect. Upon that part of the case there is no doubt. But the counsel for the plaintiff in error relied on the goodness of the sixth plea. Under stat. 5 & 6 W. 4. c. 76. the town council of every borough was directed to appoint, on the 9th of *November* in that year, a fit person, not being a member of the council, to be the treasurer of the borough, and to take security for the due execution of his office of treasurer, as they should think proper; and, in case of vacancy by death, resignation, removal, or otherwise, they were to appoint another fit person. *D. Murray*, the treasurer, was appointed from the 9th *November* 1842, under this Act. In the year 1843, stat. 6 & 7 *Vict.* c. 89. passed; which, reciting that the annual appointment to the office of treasurer was inconvenient and unnecessary, enacted that, on the 9th of *November* then next, the council of each borough should appoint a fit person to hold the office during the pleasure of the council, and that, on the happening of any vacancy thereafter, by death, resignation, amotion

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1854. or otherwise, the council should appoint a successor.

Mayor of *D. Murray* was again appointed, on the 9th of *November*
 BERWICK 1843, under this Act, to hold the office at pleasure. *D.*
 v. *Murray's* defaults, in respect of which the action was
 OSWALD. brought, all occurred since this appointment: and the
 Parke B. question raised by the sixth plea is, Whether these de-
 faults come within the meaning of the condition of the
 deed poll. It is perfectly clear, as Lord *Campbell* states
 in his judgment, that, according to the authority of Lord
Arlington v. Merricke (a) and numerous subsequent
 decisions, the liability of the sureties of *D. Murray* for
 his subsequent defaults would have ceased to exist, on
 the 9th *November* 1842, the end of the year of his first
 appointment, however long he might have been con-
 tinued in the office of treasurer, if to the words "during
 the whole time of my continuing in the said office, in
 consequence of the said election," there had not been
 added the further words, "or under any annual or other
 future election of the said council to the said office." The
 question mainly turns on the construction of these
 words. It is perfectly clear that these words are intended
 to extend the liability of the obligors beyond the money
 received by the treasurer by virtue of the appointment
 then made. They apply to all received by him during
 the time of his continuing in office in consequence
 of that election, or any other future one. The mean-
 ing of the word "appoint," which, if it stood alone,
 would have been confined to the appointment recited,
 is extended by the context to every future renewed
 appointment by a new election. There cannot be
 any doubt that it was competent for the council, in

(a) 2 *Saund.* 403.

order to obviate the expense and trouble of having fresh bonds at subsequent periods, to take a bond for the faithful discharge of the duties of the office of treasurer, not for one year only, but for any number of years, or any number of periods, whether successive or not, during which he might serve the same office, or indeed any office under them at any future time. Of the legality of a bond to that effect no question can arise. The only questions are: 1st, as to the meaning of the additional words in this case, Whether they extend to appointments made under the subsequent Act of Parliament, which are not annual, but for an indefinite time, at pleasure; and, 2d, Whether the office, after the passing of that Act, is to be considered *the same* office as that in respect of which the bond was given. I am of opinion on both points in favour of the defendants in error. I think that the meaning of the words clearly is, that, if the person elected fill the same office continually (for the use of the word *continues* shews that it was not intended to apply to disconnected appointments, at future periods), no matter by what species of election or appointment, whether annual or any other, quarterly, monthly, or at pleasure, the obligors are to be bound for the faithful discharge of the duties of his office. Whether the parties really contemplated the alteration by a new statute of the provision in the stat. 5 & 6 W. 4. c. 76., requiring the election to be annual, or not, I do not think it necessary to inquire. It is not indeed a very probable supposition, that they meant to provide for the case of an appointment, other than annual, under the then existing law, either on the ground that stat. 5 & 6 W. 4. c. 76. was *directory* only, and such an appointment would therefore if made by the

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council, though in violation of their duty, be not invalid, or on the ground that the treasurer might resign his office in the middle of the year, and yet immediately afterwards change his mind and wish to resume it, and immediately be lawfully reelected for the remainder of the year. Whether the parties did or did not actually contemplate such change by a new statute, I think that they have clearly expressed their intention that any future alteration in the period of the tenure of the office, however made, and whether it required a future law or not, should make no difference in the liability of the obligors, provided the appointment was in continuance of the former one. The obligors bind themselves that, if such alteration should actually occur, however it might happen, they would be responsible. The only remaining question is, Whether the nature of the office, and its functions, as well as the period of its tenure, are changed by stat. 6 & 7 *Vict. c. 89.*; for then it would not be the same office to which he was originally appointed, and the sureties would have a different liability from what they stipulated for. I am of opinion that its nature, functions and duties continue precisely the same under stat. 6 & 7 *Vict. c. 89.* as they were under stat. 5 & 6 *W. 4. c. 76.* It is still the office of treasurer of the borough, and is described in the statute of *Victoria* as the same office as before. The duties in the receipt of moneys are the same; the mode of accounting is the same; it is only when directed by the council. Stat. 5 & 6 *W. 4. c. 76. ss. 59., 60., 93., 126.* states the duties of treasurer. Stat. 6 & 7 *Vict. c. 89.* makes no difference in them; these sections continue in full operation. By sect. 60 of the former statute, the treasurer is to account during his continuance in the office, or within

three months after its expiration, in such manner and at such times as the council shall direct. Stat. 6 & 7 *Vict. c. 89.* makes no difference whatever in this respect; he is still to account only whenever the council shall direct. There is no difference then in the duties of the office, which can affect the sureties. It is very true, however, as was argued before us, that there is a difference, so as to affect the sureties, since the passing of stat. 6 & 7 *Vict. c. 89.*; for under the former statute, 5 & 6 *W. 4. c. 76.*, the treasurer, if he misconducted himself, might not be reelected at the end of the year, and so the sureties would be released from their responsibility for a subsequent year; but under stat. 6 & 7 *Vict. c. 89.*, the office being held during pleasure, the same degree of misconduct might not induce the council to dismiss him as would have prevented them from reelecting him. Again, there is a difference as to the chance of his being called to account by the council where he is annually reelected, and where he holds continuously at pleasure, as it might reasonably be supposed that, before they reelected, they would probably order him to account. But these differences arise, not from an alteration of the duties, but merely from the alteration of the tenure of the office, from its being made an office during pleasure, instead of for a certain period; and any difference of tenure is provided for by the stipulation that the deed shall apply to the office of treasurer, whether that office is executed pursuant to *an annual* or *any other* future appointment by the council, including an appointment at will.

I am of opinion, therefore, that, as the alteration of tenure of the office is contemplated and provided for by the deed, and as the nature, functions and duties of the office irrespective of the tenure of it are the same,

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Abstract

(11) See note (2) to *Wallon v. Waterhouse*, 2 U.S. 421 n.

it may be so; but, if it be, in my judgment that language was used with reference to the law as it stood when the contract was made.

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Pollock C. B.

The expression "any annual or other future election" would, as the law stood at the date of the bond, mean any election for a year or any term less than a year; and the word "*other*" has abundance of meaning without its referring to a change of the law: and it is to be observed that the treasurer, at his first election, was elected for nine months only.

The point on which I differ is this. Any language used in a contract must be construed with reference to the state of the law when the contract was made. No doubt parties may contract with reference to a change of the law; but those who seek so to construe an agreement are bound to make out affirmatively that this *was* meant by the contracting parties; and it must clearly appear from the language used that it was so meant. *Primâ facie*, I think it is to be presumed and intended that the contract refers to the existing state of the law; and I think there are no words, nor any expression, from which I can reasonably draw the conclusion that the sureties intended to bind themselves under a change of the law which would seriously alter their responsibility: and I think an election (substantially) *for life* most undoubtedly does alter the responsibility, as contrasted with an annual election, as my brother *Maule* has clearly and unanswerably pointed out. I therefore think the judgment ought to be reversed.

JERVIS C. J. Two points were made in this case. It was first contended that the bond was applicable to the treasurer's first year of office only; and for this *Lord*

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Arlington v. Merricke (a) and *Liverpool Waterworks Company v. Atkinson* (b) were cited. But it seems to me that the words of the condition answer this objection, and shew that the bond was not intended to be confined to the first year of office only. The condition is, that the principal shall well and truly pay to the Mayor &c. all rents, sums of money, penalties and other moneys which he shall receive in virtue of his said appointment as treasurer as aforesaid (referring to his election for part of the year until the 9th of *November* which had been recited in the bond) during the whole time of his continuing in the said office in consequence of the said election, or under any annual or other future election of the said council to the said office. If the condition had stopped at the words "in consequence of the said election," there would have been nothing to shew that it was intended to extend beyond the then current year; but the words "or under any annual or other future election of the said council to the said office" clearly shew that the parties had in view an election after the 9th of *November*, referred to in the recital, by which the treasurer might be continued in his office, and for his good conduct in which office they intended to be responsible. It would be a very refined construction to hold that the sureties merely engaged that the treasurer should, whilst he continued treasurer under the first appointment or under any annual or future election, account only for those moneys which were due during the first year, and received by him in consequence of his appointment as treasurer as aforesaid, that is to say until the 9th of *November*.

(a) 2 *Saund.* 403.(b) 6 *East*, 507.

The principal question is, Whether, the tenure of the treasurer's office having been altered by statute after the bond was given, the obligation continues. And I am of opinion that it does not. When the bond was given, the office of treasurer was regulated by stat. 5 & 6 *W.* 4. c. 76. By the 58th section of that Act the office of treasurer was an annual office, to be appointed, that is, by election, on the 9th of *November* in every year, by the council of the borough. The sureties therefore had a right to expect that if their principal misconducted himself in his office he would not be reelected. On the 9th of *November* in every year he would cease to hold the office unless he had a proposer and seconder, and a majority of those who were then present at the council in his favour. It was some security to them that the council must take active measures in reappointing the treasurer if the sureties were to continue liable. Before the alleged breach of this bond took place, the tenure of the office of treasurer had been altered. It was then regulated by stat. 6 & 7 *Vict.* c. 89., the 6th section of which enacted that, on the 9th of *November* then next, the treasurer should be elected by the council, and, after such election, should thenceforth hold his office during the pleasure of the council for the time being. It is clear that this statute made a very considerable difference in the position of the sureties. Under the former statute the treasurer lost his office on the 9th of *November*, unless a majority of the council were satisfied with his conduct, and took active steps on his behalf: by the new law he continued in office, unless a majority took active steps against him. In the former case, many might forbear to act from suspicion or mistrust; in the latter, few could be influenced to remove

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an officer from his situation without strong evidence of misconduct. The difference between a reappointment and a removal is too striking to require further observation. But it is said that we are bound to give effect to every word of the bond, and that the words "other future election," pointing to an election other than an annual election, which alone could take place under the first statute, must have some meaning, and were intended to apply to any election which might thereafter take place, whether under the then existing or any other statutes. I agree that this is a safe rule of construction; but it must be taken with some qualification. We must not violate the intention of the parties for the mere purpose of complying with technical rules. Now surely, when parties enter into a contract, they must, unless they express themselves clearly to the contrary, be understood to make their engagement with reference to the law and facts as they then are, and not to speculate upon matters which they cannot foresee, and which, not then being in existence, they cannot understand. In my opinion, the sureties intended to guarantee the faithful conduct of the treasurer whilst he continued such officer under any annual or other future election which might take place in the office as it then was regulated by stat. 5 & 6 W. 4. c. 76., and no more: and, when I am told that in that case no effective meaning is given to the word "other," I answer that words of that and a similar import are daily used in instruments of this nature, from abundant caution; and that it is not at all improbable that the draftsman may have inserted that word to avoid all question should the office be determined in the middle of the year, or should the officer, from unforeseen circumstances, be elected on

any other day than the 9th of *November*, in which case the election would not be an annual election.

For these reasons I am of opinion that the judgment ought to be reversed.

Judgment affirmed.

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SAMUEL BURCHFIELD *against* WILLIAM MOORE.

*Saturday,
May 6th.*

ACTION for that one "*John Single*, on 12th *November* 1853, by his bill of exchange, now over due, directed to the defendant, required the defendant to pay to the order of the said *John Single* 28*l.* 12*s.* two months after date thereof, and the defendant accepted the said bill, and the said *John Single* indorsed the same to *Charles Lower*, and the said *Charles Lower* indorsed the same to *Thomas Wright*, and the said *Thomas Wright* indorsed the same to *Daniel James Senols*, and the said *Daniel James Senols* indorsed the same to *Joseph Elliott*, and the said *Joseph Elliott* indorsed the same to *Samuel Mitchell*, and the said *Samuel Mitchell* indorsed the same to *William Brumfield Reed*, and the said *William Brumfield Reed* indorsed the same to *Thomas Blaber Daniell*, and the said *Thomas Blaber Daniell* indorsed the same to the plaintiff, but the defendant did not pay the same." Plea: "That, after the said bill was drawn and accepted as aforesaid, and after it was completely issued and negotiated, to wit by the defendant as acceptor as aforesaid, and whilst the same was in the possession of the said *John Single*, or of the plaintiff, or of one other of the said persons

An unauthorized alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, even as against a *bonâ fide* holder, subsequently taking the bill for value and without notice of the alteration.

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who so indorsed the said bill as aforesaid, a person whose name is to the defendant as yet unknown, without the consent of the defendant, wilfully altered and changed the said bill in a material part, and inserted material words at the foot of the defendant's said acceptance; and the said alteration and insertion were not made in correction of any mistake originally made in framing the said bill, or to further the first intentions of the parties thereto, or any of them."

Replication: "That, at the time the said bill was indorsed to plaintiff, the alleged alteration was already made; and that, neither before, nor at, the time when the said bill was indorsed to him, had he the plaintiff any notice that the said bill had been so altered, as in the said plea mentioned; and that there was a valuable consideration for the said indorsement to him the plaintiff; and that, at the time of the said indorsement to him, he took the said bill in good faith, in the belief that it was a valid bill, and that it was so indorsed to him before the day on which it became due; and that the said supposed alteration consists only of the addition of the words following, to wit, "payable at the *Bull Inn Aldgate*;" and that there is not, nor ever was, any thing on the bill, or in the said addition, to indicate that it was an addition or alteration; and that, notwithstanding the said alteration, the acceptance as altered was a general acceptance, as it had been before the alteration." Demurrer. Joinder.

The case was argued (a) in this Term.

Holland, for the defendant, was stopped by the Court.

(a) *Friday, May 5th.* Before Lord Campbell C. J., Wightman and Crompton Js.

Bovill, for the plaintiff. The principle on which the plea is grounded is explained in *Davidson v. Cooper* (a). It is, that the party who has the custody of an instrument is bound to keep it in its original state. But the replication shews that the alteration was made before the bill came to the plaintiff: a bonâ fide transferee is not affected by the fraud of his indorsers; neither ought he to be affected by his laches.

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Holland, in reply. The alteration avoided the bill, *Macintosh v. Haydon* (b), *Desbrowe v. Wetherby* (c), *Taylor v. Moseley* (d). The plaintiff is in the same position as if he had innocently given value for a forged acceptance.

Cur. adv. vult.

LORD CAMPBELL. C. J. now delivered judgment.

On account of the general importance of the question which arises in this case, we have taken time to consider it; but, after examining the authorities, we feel bound to abide by the opinion which we formed during the argument, and to give judgment for the defendant. We must assume, upon the pleadings, that, after the bill was accepted and put into circulation, it was altered in a material part, without the consent or knowledge of the acceptor. The replication shews that this was by adding to the acceptance the words "payable at *The Bull Inn Aldgate*." By virtue of stat. 1 & 2 G. 4. c. 78. these words, if in the handwriting of the defendant, would still

(a) 13 M. & W. 343., affirming the judgment of the Exchequer in *Davidson v. Cooper*, 11 M. & W. 778.

(b) Ry. & Moo. 362.

(c) 1 M. & Rob. 438.

(d) 1 M. & Rob. 439, note (a).

1854. leave the acceptance a general acceptance. Nevertheless
 BURCHFIELD three very eminent Judges have successively held (Lord
 v. Tenterden in *Macintosh v. Haydon* (a), Lord C. J.
 MOORE Tindal in *Desbroue v. Wetherby* (b) and Lord Lyndhurst
 in *Taylor v. Moseley* (c)), that such words, although they
 do not alter the direct liability of the acceptor, do vary
 the contract between others who are parties to the bill;
 therefore that, if interpolated without his consent, they
 may prejudice the acceptor; that they amount to a
 material alteration of the bill; and that they discharge
 the acceptor. These decisions were only at Nisi prius;
 but they have been long acquiesced in; and we do not
 disapprove of them. The plaintiff here is a bonâ fide
 holder, for value, without notice of the alteration; but
 the bill must be considered as vitiated in the hands of a
 prior holder. The defendant was discharged from his
 liability as acceptor from the moment when the alteration
 of the bill had been consummated: and, the instrument
 having ceased in point of law to be an accepted bill, the
 indorsee afterwards could be in no better situation than
 the indorser.

As soon as it is established that there has been a
 material alteration in a bill of exchange, the particular
 nature of the alteration becomes immaterial; and *Master*
v. Miller (d) becomes an authority. There a bill was
 drawn payable to *Wilkinson & Cooke*; while in their
 possession, the date was altered; and, the bill being
 subsequently indorsed to the plaintiffs, who were (like
 the present plaintiff) bonâ fide indorsees for value, the

(a) *Ry. & Mo.* 362.

(b) 1 *M. & Rob.* 438.

(c) 1 *M. & Rob.* 439. n.

(d) 4 *T. R.* 320; affirmed on error, in Exch. Ch. *Master v. Miller*,
 2 *H. Bl.* 140. See note in 1 *Smith's Lea. Ca.* 490.

judgment was that they could not recover against the acceptor. *Ashurst J.* says (a): "If *Wilkinson & Cooke* had brought this action, they clearly could not have recovered, because they must suffer from any alteration of the bill while it was in their custody:" the same objection "must also hold with regard to the plaintiffs, who derive title under them." We conceive therefore that in this case the plaintiff's remedy is confined to a right to recover the consideration for the bill, as between himself and the party from whom he received it: a similar remedy may be resorted to till the party is reached through whose fraud or laches the alteration was made.

He ought to suffer; for "a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state" (b); and Lord *Denman*, in delivering the judgment of the Exchequer Chamber in *Davidson v. Cooper* (b), intimates a strong opinion that *Pigot's Case* (c), in which this principle is acted upon, has hitherto been, and still ought to be, upheld. The negotiability of bills of exchange is to be favoured; but with this view it is material that their purity should be preserved.

For these reasons we think that the replication demurred to is bad, and that there must be

Judgment for the defendant (d).

(a) 4 T. R. 331.

(b) 13 M. & W. 352.

(c) 11 Rep. 26 b.

(d) See *Agricultural Cattle Insurance Company v. Fitzgerald*, 16 Q. B. 432.

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*Monday,
May 8th.*

The QUEEN *against* The Overseers of the Poor
of the Parish of KINGSWINFORD.

A rule was obtained calling on the overseers of a parish to shew cause why two justices should not issue their warrant, under sect. 38 of stat. 3 & 4 W. 4. c. 90. (The Parochial Lighting and Watching Act), to levy by distress on the goods of the overseers two sums of money ordered to be paid by the inspectors of a district within the parish, in which the provisions of that Act had been adopted. By the affidavits it appeared that the district was one assigned to a chapel for ecclesiastical purposes, under stat. 1 & 2 W. 4.

KEATING, in *Hilary* Term, had obtained a rule calling on the overseers of the poor of the parish of *Kingswinford*, and on two justices of *Stafford*, to shew cause why the two justices should not issue a warrant to levy two several sums of money ordered to be raised by the inspectors appointed under stat. 3 & 4 W. 4. c. 90. for the purposes of that Act, within the district of *Brierly Hill* in that parish, by distress on the goods and chattels of the overseers.

The rule was obtained on an affidavit, by which it appeared that *Brierly Hill*, within the parish of *Kingswinford*, is a district, assigned for ecclesiastical purposes, under stat. 1 & 2 W. 4. c. 38., to a church or chapel, called *St. Michael's, Brierly Hill*, and that the churchwardens are annually elected for this district. On 12th *August*, 1851, a requisition, signed by three ratepayers of the parish of *Kingswinford*, inhabitants of *Brierly Hill*, was addressed to the churchwardens of *Brierly Hill*, calling on them to appoint a time and place for a public meeting of the ratepayers of *Brierly Hill*, for the purpose of determining whether the provisions

c. 38.; and that the provisions of stat. 3 & 4 W. 4. c. 90. had been adopted, more than two years before the application, at a meeting convened by the churchwardens of the district church. These churchwardens, as was shewn affirmatively by the affidavits, were churchwardens for ecclesiastical purposes only, and never in the habit of calling meetings for secular purposes.

Held: that the meeting was improperly convened, the churchwardens of the district church not being such churchwardens as are contemplated by stat. 3 & 4 W. 4. c. 90. s. 5.; that consequently the provisions of the Act had never been duly adopted in the district; and that the order of inspectors was void.

Rule discharged.

in stat. 3 & 4 *W.* 4. c. 90. (the Act for Watching and Lighting Parishes) should be adopted, and be carried into execution in that parish. The churchwardens of *Brierly Hill*, accordingly, within ten days of the receipt of the requisition, convened a meeting for 25th *August* 1851 by a notice, which was affixed to the door of the church of *Brierly Hill*. The meeting was held on 25th *August* 1851; when the provisions of the Act, so far as related to lighting, were unanimously adopted. Twelve inspectors were appointed at the same meeting; and the amount to be raised was fixed. Notice of the adoption of the Act was given by the churchwardens in the same way as that in which notice to convene the meeting had been given. The affidavit then proceeded to shew, at considerable length, the proceedings of the inspectors: as the Court expressed no opinion on the various points raised on these proceedings, they are not further noticed in the report. It appeared that, on 18th *November* 1853, complaint was made by the inspectors, to a justice of the peace, that the overseers of the parish of *Kingswinford* had not obeyed an order, made upon them by the inspectors, to levy a sum of money required for the purposes of the Act; that a summons was issued to the overseers, under sect. 38, to appear before two justices, and that they did appear before them on the 24th *November*, 1853, where these various matters were proved, but the justices refused to issue their distress warrant.

The affidavits in answer, besides raising several points on which the Court expressed no opinion, shewed that the churchwardens of *Brierly Hill*, at the time the provisions of the Act were supposed to be adopted, were only churchwardens for ecclesiastical purposes, and that all the parish business of the whole of *Kingswinford*,

1854.

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1854. including *Brierly Hill*, was transacted by the church-
 wardens of *Kingswinford*; those of *Brierly Hill* never, in
 fact, interfering, or calling any meetings for any secular
 purpose.

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 WINFORD.

Hugh Hill and *Cowling* now shewed cause. The provisions of stat. 3 & 4 W. 4. c. 90. have never been legally adopted in the parochial district of *Brierly Hill*. It is not a parish, properly so called, but a district in a parish, assigned, under stat. 1 & 2 W. 4. c. 38., for ecclesiastical purposes to a church. The provisions of stat. 3 & 4 W. 4. c. 90. might, however have been adopted within such a district, had the right course been pursued. It does not distinctly appear whether this district of *Brierly Hill* has been assigned to *St. Michael's* Church, under sect. 10 of stat. 1 & 2 W. 4. c. 38., or under sect. 23. If it has been assigned under sect. 10, there has been merely a delegation to a perpetual curate of part of the powers of the rector, to be exercised within that district; and the two persons appointed, under sect. 16, to act as churchwardens have their functions limited, by the same section, to matters connected with the church itself; they are not churchwardens of the district at all. If the district is one under sect. 23, it is a completely "separate and distinct parish for all spiritual purposes;" and the churchwardens, to be appointed under sect. 25, are to "do all things pertaining to the office of churchwardens, as to ecclesiastical matters, in the said new parish, in like manner as though the same had been of old time a separate and distinct parish." But these churchwardens are not empowered to do any thing pertaining to the office of churchwarden in respect to parochial matters not ecclesiastical. Then

stat. 3 & 4 W. 4. c. 90. s. 5. requires that the first step for adopting the provisions of that Act shall be that, on "the application in writing of three or more of the rate-payers of any parish, it shall be lawful for the churchwardens thereof" to call a meeting. Sect. 77 enacts that, "where the word 'parish' is used, it shall be understood to extend to any parts within the same; and that the powers given to a churchwarden shall be understood to be given to any chapelwarden, overseer, or other person usually calling any meeting on parochial business." So the provisions of the Act might have been extended to *Brierly Hill*; for it is a parish within this definition; but the meeting ought to have been called by the persons "usually calling any meeting on parochial business," that is, the churchwardens of *Kingswinford*; for it is clear the churchwardens of *Brierly Hill* never called such meetings. It may be said that the churchwardens of *Kingswinford* never do call meetings of the inhabitants of *Brierly Hill*, separately from the inhabitants of the rest of the parish of *Kingswinford*. If that be so, the course to be pursued is prescribed in sect. 73; and it has not been followed. [The argument on the other objections is omitted, as the Court pronounced no opinion upon them.]

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Keating and Bros, contra. The provisions of the Act were adopted in 1851: it is too late to question the formality of the proceedings now; the same objection was raised in *Regina v. Deverell* (a) without success. [*Erle J.* There it was not shewn, affirmatively, that the proceedings

(a) Ante, p. 372.

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v.
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KINGS-
WINFORD.

were wrong; and we acted on the principle of presuming omnia rité acta. Lord *Campbell* C. J. It is a possible thing that a meeting may be called improperly, and that an attempt may be made to rate the inhabitants though the Act has not been legally adopted; if an inhabitant wishes to question the legality of the proceedings, how do you say he is to do it?] He may appeal under sect. 66. [*Crompton* J. That is a proper remedy for something irregular after the Act is adopted; but the objection now is that the Act never was adopted. Suppose a distress, and replevin brought, the pleadings being as at common law. Could you make a good avowry without averring that the Act was properly adopted within the district, at a meeting properly called? And would not that averment be traversable? It is true that the fact that the district was de facto lighted as if the Act had been properly adopted would be evidence at the trial that it had been so, and in process of time it would be practically impossible to disprove the averment; but it would remain necessary and traversable for ever.]

Lord CAMPBELL, C. J. The rule must be discharged. It is necessary to shew us that the order of the inspectors was good, before we can be called on to command the justices to enforce it. The objection that the provisions of stat. 3 & 4 *W.* 4. c. 90. have never been properly adopted in the district is fatal. I should have been glad to find that the Legislature had fixed a limited time, after the adoption of the Act, beyond which such objections should not be taken. But I find no such provision in the Act. Mr. *Bros* indeed refers us to

sect. 66. That section gives an appeal against orders made when the Act has been adopted: but, if the Act has not been adopted, the order is null and void, and no appeal is needed. Then, the objection being open, it is made; and it goes to the root of the whole matter. The churchwardens of *Brierly Hill* were not the proper persons to call the preliminary meeting. The Act gives that power to churchwardens or those "usually calling meetings on parochial business." These officers of *Brierly Hill*, though called churchwardens, have not de facto been in the habit of calling such meetings, and have no powers to call any ordinary meeting for parochial business. That being so, they were not qualified to call the meeting at which the provisions of the Act were adopted; and what was done there was void. It is unnecessary to form an opinion on the other objections raised.

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WIGHTMAN J. I am of the same opinion, for the same reasons as my Lord.

ERLE J. The question really comes to be, whether these churchwardens of *Brierly Hill* are churchwardens within the meaning of sect. 5 of stat. 3 & 4 W. 4. c. 90., as expounded by sect. 77. And I think they are not; for the churchwardens are defined to be those usually calling any meeting or parochial business, within which class the churchwardens of this district church do not come, as they have nothing to do with such meetings. And, though it might seem reasonable that the officer of the district, though not in the habit of calling such meetings, should act for the district,

1854. in preference to the officer in the habit of acting

The QUEEN only for the whole parish, yet that is not the intention
v. of the Legislature; for sect. 73 expressly makes the
Overseers of officer of the whole competent to act for the district;
KINGS- and it would be inconvenient if there were concurring
WINFORD. powers. Then, the meeting having been improperly
convened, it failed; and time has not yet cured the
defect.

CROMPTON J. concurred.

Rule discharged.

END OF EASTER TERM.

CASES

1854.

ARGUED AND DETERMINED

IN

EASTER VACATION,

XVII. VICTORIA (a).

The Judges who sat in Banc in this Vacation
were:

COLERIDGE J.		ERLE J.
WIGHTMAN J.		CROMPTON J.

MARSDEN *against* WARDLE.

Saturday,
May 13th.

C. *MILWARD*, in the preceding Term, obtained a rule calling on the defendant to shew cause why the order of *Crompton J.*, after mentioned, should not be rescinded.

It appeared by affidavit that a plaint had been entered in the county court for *Staffordshire*, holden at *Leek*, by *Marsden* against *Wardle*, upon a promissory note for 50*l.* given by defendant to plaintiff. On the trial, before the judge of the county court, it was

After execution has been awarded in the county court, and defendant's goods have been taken, but not sold, prohibition will go to restrain the Court from proceeding further, if it appear upon affidavit, though not

on the face of the proceedings in the county court, that title to corporeal hereditaments came in question in the cause, so that the judge had no jurisdiction under stat. 9 & 10 Vict. c. 95. s. 58.

(a) The Court sat in Banc on May 12th and 13th.

1854. proved that, upon an agreement for the purchase of
MARSDEN land by defendant from plaintiff, the note had been
V. given by way of deposit on the purchase money: and
WARDLE. one defence suggested was, that the consideration for the
note had failed, the title turning out not to be valid.
And it was further contended that the title to a
corporeal hereditament came in question in the cause,
which was thus taken out of the jurisdiction by the
proviso in stat. 9 & 10 *Vict. c. 95. s. 58*. The judge
heard the case, and, being of opinion that there was no
failure of consideration, gave judgment for the plaintiff,
and ordered that payment should be made in a month.
The money not having been paid within that time, the
plaintiff, on the 18th of last *February*, caused certain
goods of the defendant to be taken in execution; so
that the sale was lawful on 24th *February* (a). On 23d
February the defendant requested the plaintiff's attorney
to extend the time for the sale to 28th *February*; stating
that he, defendant, should by that time be able to raise
money to discharge the execution. The plaintiff's
attorney consented to this; and the defendant then
signed a writing, by which he requested the person in
possession to postpone the sale till 28th *February*,
authorized him to remain in possession, and undertook
to pay the extra costs.

On 24th *February* a summons was taken out, re-
quiring defendant to shew cause why a writ of prohi-
bition should not issue; and, on 1st *March*, *Crompton J.*
ordered that the writ should issue; which was the order
now in question.

In last Term (b),

(a) Stat. 9 & 10 *Vict. c. 95. s. 106*.

(b) May 10th. Before *Coleridge, Wightman, Erle and Crompton Js.*
Wightman J. left the Court towards the close of the argument.

Morgan Lloyd shewed cause. The order for issuing the prohibition has been made under sect. 22 of stat. 13 & 14 *Vict. c. 61.*, on the ground that the county court has no jurisdiction, the title to corporeal hereditaments having come in question; stat. 9 & 10 *Vict. c. 95. s. 58.* The rule to set aside the order has been granted on the suggestion that the application has been made too late, execution having issued, though there has been no sale of the goods seized (*a*). [*Crompton J.* The point made against you is that, as the objection to the jurisdiction does not appear on the face of the proceedings, the rule applies which prevails on applications for prohibition to Ecclesiastical Courts.] The execution is not complete till sale. In 2 *Inst.* 602. it is said: "Prohibitions by law are to be granted at any time to restrain a court to intermeddle with, or execute any thing, which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary." "And the King's courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any court temporal or ecclesiastical doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgment and execution, as before." In *Fitz. N. B.* 46. it is said: "after judgment given, and execution awarded in the county, or in other court baron, which hath not power to hold plea of debt of the sum of forty shillings, &c. or of damages in trespass

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MARDEN
v.
WARDLE.

(*a*) Other grounds were also suggested, on the motion for the rule *Nisi*: but the Court granted the rule on this point only. It was afterwards attempted, on the argument, to recur to the other points: but the Court refused to entertain them; and they therefore are not further adverted to in the report in the text.

1854.

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WARDLE.

amounting to such sum, or more, the party defendant shall have a writ of prohibition unto the bailiffs, or unto the sheriff or officer of the court, that they do not execution; and if they have distrained the party to make satisfaction, that then they release the distress, and that they revoke what they have done therein." In *Jones v. Owen* (a) prohibition to the county court was granted, though the execution of the warrant of possession was complete, possession having been given to the plaintiff on the day before the bailiff had notice of the rule for the prohibition; the Judge (*Patteson J.*) saying that "the defendant came as soon as he reasonably could;" and restitution was ordered. In *In the matter of Poe* (b) there was nothing for this Court to restrain: there had been a court martial; and the Crown had ratified the sentence, which had been executed. This Court therefore refused a rule for a prohibition: but that is a very different case from the present, where the Court, which clearly may prohibit county courts acting without jurisdiction, is asked to restrain the completion of an execution as yet only inchoate. In *Robinson v. Lenaghan* (c), where execution had been levied in the county court, *Parke B.* (d) seems to have thought that, if the county court had not had jurisdiction, prohibition might have gone. It is suggested that the defect here does not appear on the face of the proceedings; and it may be asserted that there has been acquiescence in the jurisdiction. Supposing that these two facts would together constitute an answer to the application, as intimated in *Robins v. Humby* (e) and *Buggin v. Bennett* (g), at any

(a) 5 D. & L. 669.

(c) 2 Exch. 333.

(e) 3 M. & W. 120.

(b) 5 B. & Ad. 681.

(d) 2 Exch. 336.

(g) 4 Burr. 2035. 2037.

rate one alone is insufficient. In *Yates v. Palmer* (a), where the party had acquiesced by moving in the county court for a new trial, and prohibition was therefore refused, the Court expressly adverted to the circumstance that the want of jurisdiction did not appear on the proceedings themselves. Here the affidavits shew that the objection was taken in the county court: and, as to the argument urged from the proceedings not shewing the defect, that never can occur where, as in the present case, the want of jurisdiction is the result of the question of title occurring collaterally: there are no means of getting such a question on to the written proceedings of a county court, there being no pleadings.

1854.

MABSDEN
v.
WARDLE.

C. Milward, *contra*. The general rule is, that prohibition does not lie after sentence; 2 *Rol. Abr.* 319. *Prohibition* (M) pl. 1., *Full v. Hutchins* (b). In the old cases, it seems as if the Courts exercised a discretion, and looked to the conduct of the party applying; *Bishop of St. David's v. Lucy* (c): and sometimes they acted upon the information of a stranger; *Com. Dig. Prohibition* (E) (d). But it seems to be now established that, even after sentence, prohibition will be granted if the want of jurisdiction appear on the face of the proceedings; *Com. Dig. Prohibition* (D). But that is not so here; the proper course for the defendant would have been to apply to the judge to place the question on the record. [*Coleridge J.* There may be means of doing that in the Ecclesiastical Courts: but I do not see how it can be done in the county court, where the

(a) 6 *D. & L.* 283.(b) 2 *Cowp.* 422.(c) 1 *Ld. Raym.* 447. 539. 545.(d) See *Wudsworth v. Queen of Spain*, 17 *Q. B.* 171.

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v.
WARRLE.

question arises as here, there being no pleadings. And, that being so, is the rule which has been applied to Ecclesiastical Courts, in the authorities to which you refer us, applicable here? The question must be, whether the party has come in such reasonable time as to induce the Court, in the exercise of their discretion, to grant the prohibition; or else he must shew himself entitled to it *ex debito justitiæ*. And, as to this last, the rule will be as in the case of the Admiralty, where, "if the suit appears out of the jurisdiction of the Admiralty, a prohibition goes, though the party has allowed the jurisdiction there;" *Com. Dig. Admiralty* (F 9). [Coleridge J. How do you understand the word "appears?"] The proceedings themselves must disclose the objection; otherwise, the party who has lain by will not be heard to shew it. That explanation is deducible from *Ricketts v. Bodenham* (a); and this seems to agree with the view of Parke B. in *Roberts v. Humby* (b). That the acquiescence of a party may estop him from objecting to the proceedings in the county court appears from *Winsor v. Duxford* (c) and *In re Jones and James* (d). In *Jones v. Owen* (e), which has been cited as establishing a different rule, the proceedings shewed that the claim was for the possession of real property. [Erle J. In *Thompson v. Ingham* (g) prohibition went after sentence: and, from the record of the proceedings in prohibition, it is clear that the want of jurisdiction was not disclosed on the face of the proceedings in the county court.]

Cur. adv. vult.

(a) 4 A. & E. 433.

(b) 3 M. & W. 126.

(c) 12 Q. B. 603.

(d) 1 L. M. & P. 65.

(e) 5 D. & L. 669.

(g) 14 Q. B. 710.

COLERIDGE J. now delivered the judgment of the Court.

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MARSDEN
v.
WARDLE.

In this case, upon a rule for setting aside an order for a prohibition, the question was, Whether a prohibition should be granted to a county court for an excess of jurisdiction not appearing on the proceedings, although the writ was moved for after judgment in that Court. And we answer this in the affirmative.

There is reason for refusing the writ after judgment in the Courts where the proceedings set forth the detail of the matter, and the party has the opportunity of moving before judgment. Then, if he chooses to wait and take the chance of judgment in his favour, he may be held incompetent to complain of excess of jurisdiction if judgment is against him. There is, however, good reason for departing from this principle where the defect is apparent on the face of the proceedings below ; because the complaint in that case does not rest on the evidence of the complainant ; and, if such a defective record were allowed to remain, and to support a judgment, it might become a precedent : that which was in truth an excess of jurisdiction might be considered to have been held to be legal. But this principle has no application to the county courts : the proceedings there do not shew the matter in any formal way ; the excess of jurisdiction may depend only on the defence set up orally by the defendant, and may only appear in the course of the trial ; and judgment may follow almost as soon as the defence is understood. Under such circumstances, there would be no opportunity of moving for a prohibition before judgment ; and, unless the motion was allowed after judgment, the excess of jurisdiction would be without redress.

1854. In *Jones v. Owen* (a) *Patteson J.* issued a prohibition

MARRDEN to the county court after judgment, for defect not
v. appearing in the written proceedings. So also did this
WARDLE. Court in *Thompson v. Ingham* (b).

Upon these authorities and principles, we think this rule should be discharged, and the prohibition should issue.

Rule discharged (c).

(a) 5 D. & L. 669.

(b) 14 Q. B. 710.

(c) As to the question, at how early a stage prohibition to a county court may be applied for, see *Scroff v. Jones*, 1 L. M. & P. 525.

END OF EASTER VACATION.

CASES

1854.

ARGUED AND DETERMINED

IN

THE QUEEN'S BENCH,

IN

TRINITY TERM,

XVII VICTORIA.

The Judges who usually sat in Banc in this Term
were:

Lord CAMPBELL C. J.
COLERIDGE J.

ERLE J.
CROMPTON J.

DANIEL BROWN *against* ANDREW EWING BYRNE. *Friday,*
May 28th.

A writ having been issued in this case, the parties, without pleadings, by consent and the order of a Judge, stated for the opinion of this Court the following case.

A bill of lading expressed that goods, shipped at N., were deliverable at L., to order

or assigns, "he or they paying freight for the said goods five eighths of a penny sterling per pound, with five per cent. prime, and average accustomed." By the usual custom, in the trade at L., three months' interest or discount is deducted from freights, payable under bills of lading, on goods coming from certain ports, including N. The assignee of this bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law as contradicting the written contract. The assignee paid the freight, less the discount. On a case stating the above facts,

Held, that the custom was binding, and controuled the bill of lading.

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BROWN
v.
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The plaintiff is a ship owner in *Liverpool*. The defendant is a merchant there, carrying on business under the firm of *A. E. Byrne & Co.* On the 5th *October* 1853, Messrs. *J. B. Byrne & Co.*, of *New Orleans*, shipped on board the ship *Courier*, a vessel belonging to the plaintiff, 110 bales of cotton, for which the master signed a bill of lading, of which the following is a copy.

"Shipped in good order and well conditioned, by *J. B. Byrne & Co.*, on board the ship called the *Courier*, whereof *Gemmill* is master, now lying at the port of *New Orleans*, and bound for *Liverpool*, to say, one hundred and ten bales cotton, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the aforesaid port of *Liverpool* (the dangers of the sea only excepted) unto order or to assigns, he or they paying freight for the said goods five eighths of a penny sterling per pound, with 5 per cent. primage, and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished the others to stand void. Dated in *New Orleans*, the 5th day of *October* 1853. *John Gemmill*."

This bill of lading was forwarded to the defendant, indorsed to him. On the arrival of the vessel at *Liverpool*, in *February* last, the defendant claimed and received the 110 bales of cotton, as indorsee and holder of the said bill of lading. On the cargo being delivered, the following debit note was rendered to the defendant for the freight.

<i>" Messrs. A. E. Byrne & Co.</i>	<i>To Owners of The Courier.</i>	<i>Dr.</i>
For freight per said vessel from <i>New Orleans</i> on 110 Bales		
Cotton weighing 53,209 lbs. @ 5/8	- - -	138 11 3
Primage 5L per cent.	- - -	6 18 7
		<u>£145 9 10"</u>

The defendant has offered to pay 143*l.* 13*s.* 7*d.* on account of this freight: but he refuses to pay the balance 1*l.* 16*s.* 3*d.*, on the ground that, by the custom of *Liverpool*, he is entitled to a deduction of three months' discount from the freight.

1854.

 BROWN
v.
BYRNE.

It is admitted that, according to the usual custom prevailing amongst merchants and ship owners in *Liverpool*, three months' interest or discount is deducted from freights payable under bills of lading, on goods coming from certain ports in the Southern states of *America*, viz. *New Orleans, Mobile, Charleston* and *Savannah*, whether such freights are paid by the shippers, the consignees named in the bill of lading, or by the assignees of the bill of lading. The custom does not entitle the merchant to three months or any credit for freights, which are always due on delivery; nor does it extend to the Northern *American* ports, or to *Apalachicola* in the South; freights from those ports being always payable in cash without any deduction. The plaintiff contends that the custom is not good in law, being inconsistent with the written document. The Court is to be at liberty to draw any inference of fact which a jury might draw.

The questions for the Court are: Whether the custom to deduct three months' discount from freights is good in law; and Whether the plaintiff is, under the circumstances of the case, entitled to recover the said sum of 1*l.* 16*s.* 3*d.* from the defendant.

The case was argued in *Easter Vacation* (a).

Mellish, for the plaintiff. There are two questions

(a) On *Friday, May 11th.* Before *Coleridge, Wightman, Erle* and *Crompton Js.*

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1854. involved: First, whether the custom is admissible, to
BROWN give a construction to the bill of lading, as between the
v. parties to that written instrument; Second, supposing
BYRNE. that the custom is not admissible, as between the
parties to the instrument, whether it is admissible
between the ship owner and the defendant who is
an assignee of the bill of lading. As to the first.
There is no difference, in this respect, between a bill
of lading and any other written contract. Evidence
is always admissible to interpret the words used in a
writing, and to shew that, by custom, these words have
acquired an artificial sense. It is also admissible to
annex incidents as to which the contract is silent; but
the incidents thus annexed must not be inconsistent with
what is expressed. Confusion often arises from not dis-
tinguishing between these two rules. In the present case
it is clear that it is not sought to translate words used in
an artificial sense. It is not alleged that either of the
words "paying" or "freight" has by custom acquired
in *Liverpool* a peculiar sense; for these words, when used
in bills of lading from other ports to *Liverpool*, have
their ordinary meaning. It is therefore an attempt
to say that, in this particular trade, a written contract
to pay 145*l.* 9*s.* 10*d.* for the carriage of 110 bales
of cotton shall, by custom, bind the party to pay
143*l.* 13*s.* 7*d.* and no more. Such a custom directly
contradicts the written contract. In the note (a)
to *Wigglesworth v. Dallison* (b) the rule is thus laid
down by the late-Mr. *Smith*. "However, evidence of
usage, though sometimes admissible to add to, or
explain, is never so to vary, or to contradict either

(a) 1 *Smith's L. C.* 305. 309.(b) 1 *Doug.* 201.

expressly or by implication, the terms of a written instrument." [Erle J. Do you make a distinction between a written contract, and one expressed in the same words, but verbal?] Evidence might be received to explain a verbal contract, but not a written one. The last editors of *Smith's Leading Cases* add: "Evidence of previous usage between the parties to a contract may be admitted with the same effect, but subject to the same restrictions, as a general usage of trade." Evidence of an usage, between the parties, to give credit was excluded in *Ford v. Yates* (a), because it contradicted the written contract. [Wightman J. In *Syers v. Jonas* (b), at the trial, I rejected evidence of a custom that all sales in the tobacco trade at *Liverpool* were by sample, on the ground that it varied the written contract which was silent as to any sample. The Court of Exchequer decided that I was wrong.] That decision has been much questioned in *Spurtali v. Benecke* (c). In that latter case the contract in writing was for a sale of goods "to be paid for by cash in one month, less 5*l.* per cent. discount." The Court of Common Pleas held that this implied a sale on credit, and an immediate delivery, and that evidence of a custom that buyers had an option to take delivery at any time till the expiration of the period named in the contract, but must pay the price on delivery, was inconsistent with the writing, and was inadmissible. The principle is laid down in *Blackett v. Royal Exchange Assurance Company* (d) by Lord Lyndhurst: "Usage may be admissible to explain what is doubtful, it is never admissible to contradict

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 v.
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(a) 2 *M. & G.* 549.(b) 2 *Exch.* 111.(c) 10 *Com. B.* 212, 226.(d) 2 *C. & J.* 244, 249.

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what is plain." If the custom be admissible to shew that "paying freight for the said goods five eighths of a penny sterling per pound" means paying less than five eighths of a penny, it seems impossible to exclude custom in any case. [*Crompton J.* Suppose that there were a customary allowance in estimating the weight of the pound. That would affect the sum to be paid. In *Bold v. Rayner* (a) the bought note was for 100 tons of palm oil "to be taken from the quay at landing weights, with customary allowances." The sold note was simply for 100 tons. At the trial, *Parke B.* admitted evidence that there was a custom that palm oil was to be taken from the quay at landing weights, with certain known customary allowances; and he ruled that, this custom being incorporated in the written contract, there was no variance between the bought and sold notes.] It might be there admissible as shewing that ton does not mean twenty hundredweight, as in *Smith v. Wilson* (b), where 1000 rabbits was shewn to mean six score. It is a case of the translation of a word used in an artificial sense. In *Trueman v. Loder* (c) Lord *Denman*, after remarking on the inconvenience of admitting customs, says (d): "Evidence of the prevailing custom is supposed to shew that both parties had in their contemplation more than appears in the writing; but supposing them both to have, not only contemplated, but distinctly expressed, in the plainest words, that they considered their contract to include a provision not to be found in the paper, still the evidence cannot be introduced into the cause. Custom of trade has been supposed to form a virtual exception to this well known rule; but the cases go no

(a) 1 M. & W. 343.

(b) 3 B. & Ad. 728.

(c) 11 A. & E. 589.

(d) 11 A. & E. 598.

farther than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract." Then, as to the second point, the promise, to be inferred from the taking of the goods without payment, is to pay the full amount for which the holder had a lien; and, that being so, the assignee has promised to pay according to the original contract; and there is no difference between the liability of an assignee and that of a party to the bill of lading.

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Blackburn, contra. Perhaps it is not possible to reconcile all the cases on this subject, or to lay down accurately the limits to the admissibility of custom. But the cases agree in laying down limits which certainly include this case. It may be convenient first to answer a question, put from the Bench, as to whether there is a distinction between written and verbal contracts. There is a difference; but in this respect there is none. When the parties have agreed that a particular writing shall be the record of their contract, they cannot by other evidence shew that their intention was something different from what they have expressed in that record. When there is no record of the contract, the intention is to be gathered, not only from their words, but from everything else. But, if the parties met for the first and last time, and made a contract entirely by words, these words would, if proved, have precisely the same construction as if they had been written down. In either case the contract is to be gathered from the meaning of the words. *Ford v. Yates* (a) is a case referable to this distinction between a writing which is

(a) 2 M. & G. 549.

1854. the record of a contract, and one which is only, along
 BROWN with other things, evidence of intention. There the
 v. Judge at Nisi prius seems to have thought the memo-
 BYRNE. randum not the record of the contract; the Court in
 banc took a different view of the fact, and thought it was
 so. But, whether the contract be in writing or verbal,
 all incidents annexed by law or by custom are tacitly
 understood; In contractibus tacitè veniunt ea, quæ sunt
 moris et consuetudinis; *Pothier Traité des Obligations*,
Partie 1. c. 1. sect. 1. art. 7. § 95. (a). Where these
 incidents are annexed by the general law, or by the law
 merchant, the Court takes judicial notice of it: where
 they are annexed by the custom, the local law as it
 may be called, it is to be proved by evidence. It is
 quite true that evidence is also admissible to interpret
 words; but that is on a different ground. If a contract
 were made in *France* between *Frenchmen*, and were
 sued on here, an interpreter would be sworn to prove
 the meaning of the *French* words; but evidence of
French lawyers would also be admissible, to shew what
 incidents the *French* law annexed to such a contract;
 for such incidents are tacitly incorporated. But the
 parties may, by express words or by implication, agree
 to exclude the incident which the general law would
 annex if they were silent; and it is exactly the same
 where the incident is annexed by custom or local law.
 In *Syers v. Jonas* (*b*) *Parke* B., in delivering the judg-
 ment of the Court, says: "There is no doubt that in
 mercantile transactions, and others of ordinary occur-
 rence, evidence of established usage is admissible, not
 merely to explain the terms used, but to annex cus-

(a) *Tom. 1. p. 52. (ed. 1827).*(b) 2 *Exch.* 116.

tomary incidents. In the case of *Hutton v. Warren* (a) the law on this subject was laid down fully and the limitations pointed out. Such usage is admissible when it is not expressly or impliedly excluded by the tenor of the written instrument." In the present case, if the wording of the bill of lading had been "he or they paying freight for the said goods five eighths of a penny per pound, cash without deduction," the tenor of the instrument would have expressly excluded the custom; but there are no such words. Then the question is, not whether the custom if admitted will vary, or be inconsistent with, the contract as it would stand without the custom, but whether it is impliedly excluded by the tenor of the instrument. The other mode of enunciating the proposition has been used by high authorities, but evidently is inaccurate. No one ever did or ever will seek to annex an incident by proof of a custom, except for the express purpose of varying the contract from what it would be if the custom were not proved. In *Syers v. Jonas* (b) the verdict for the plaintiff was set aside, because the contract for the sale of tobacco, with the customary incident that it should be equal to sample, was materially different from the written contract for a sale generally. In *Bold v. Rayner* (c) there was a material variance between the bought and sold notes; and, if the custom had not been proved, the plaintiff must have been nonsuited; *Siewwright v. Archibald* (d). But the evidence of custom entitled the plaintiff to a verdict because it did vary the contract. Then, are the words here such as to shew impliedly that the parties intended to exclude the cus-

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(a) 1 M. & W. 466.

(b) 2 Exch. 111.

(c) 1 M. & W. 343.

(d) 17 Q. B. 103.

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tom? Paying is not a technical word; *Turney v. Dodwell* (a). In *Gaskill v. Skene* (b) the word "payment," used in the particulars of demand, was to be construed. *Erle J.* there says: "It is true that, in pleading, a lesser sum cannot be treated as payment of a greater. But particulars of demand are to be construed, not as pleadings, but in the sense which the words bear in ordinary use. Now every one knows from his own private experience, and we judicially learn in the course of the trials before us, that a larger debt may, by a customary trade allowance, or by deducting discount or otherwise, be discharged by the payment of a smaller sum, and that in common language the account would then be said to be paid." If for the word "paying" in the bill of lading this explanation be substituted, it will become impossible to contend that the tenor of the instrument impliedly excludes the custom. It is true that the result is, that the invoice, which, without the custom, would be right, is, with the custom, wrong. But, as has been pointed out by the Court, the same result would happen if, instead of a customary discount on the money, there were a customary allowance on the weight; and *Bold v. Rayner* (c) is an express authority that such a customary allowance is implied. In the same case other customs were admitted. In the one note it was "Ex *Speedy and Charlotte*, to arrive;" in the other "from the *Speedy or Charlotte*, expected to arrive:" it was pointed out in the argument that these were different contracts; but *Parke B.* said: "Yes, if you read it strictly and; but the evidence was that the custom reads it

(a) 3 E. & B. 136.

(b) 14 Q. B. 664. 671.

(c) 1 M. & W. 343.

or" (a). In *Cochran v. Retberg* (b), where there was a written contract, by which a vessel was "to be discharged in fourteen days, or to pay five guineas a day demurrage," a custom to exclude *Sundays* and holidays was admitted in evidence by Lord *Eldon*, though the effect was that the plaintiff, who by the written contract unexplained was entitled to six days' demurrage, failed in his action. In *Grant v. Maddox* (c) an engagement of an actress for "three years, at a salary of five, six, and seven pounds per week in those years respectively," which, unexplained, would have bound the defendant to pay fifty two times five pounds in the first year, was cut down by the admission of a custom, amongst theatrical people, to make no weekly payments to actors during the vacation. These are all stronger cases than the present. What is said by Lord *Denman* in *Trueman v. Loder* (d) was not material to the decision in the case, but was obiter merely. The doubt whether the admission of custom was originally expedient had been before expressed by *Parke B.* in *Hutton v. Warren* (e), by Lord *Eldon* in *Anderson v. Pitcher* (g), and, according to Lord *Eldon*, by Lord *Holt*, though the passage referred to (h) scarcely bears out the assertion as to Lord *Holt*. But all those great Judges thought the rule well established, and not now to be departed from. *Spartali v. Benecke* (i) professed to lay down the same rule, though it seems doubtful if it was correctly applied in that case.

Then, supposing that, between the parties to the bill

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(a) 1 M. & W. 346.

(c) 15 M. & W. 737.

(e) 1 M. & W. 475.

(h) *Lethulier's Case*, 2 Salk. 443.

(b) 3 Esp. N. P. C. 121.

(d) 11 A. & E. 508.

(g) 2 B. & P. 164. 168.

(i) 10 Com. B. 212.

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of lading, the custom is excluded, still this defendant is not liable. His contract is not implied by law, but is to be inferred as a fact; *Sanders v. Vanzeller* (a): the promise to be inferred is that he will pay as usual de facto, whether the usage is, as between the parties to the bill of lading, enforceable at law, or not. [*Crompton* J. It would be most inconvenient if there were one rule for the consignee, and the other for the assignee.] It cannot be denied that there is evidence to support a finding either way. [*Wightman* J. We are here a jury: and I think you must be content to have the verdict found against you, subject to the first point.]

Mellish was heard in reply.

Cur. adv. vult.

COLERIDGE J. now delivered judgment.

This was a special case extremely well argued before my brothers *Wightman*, *Erle*, *Crompton* and myself, at the sittings after last term, by Mr. *Mellish* and Mr. *Blackburn*. And the question for decision is shortly this: Whether, in an action by a ship owner against the indorsee of a bill of lading, to whom goods have been delivered at *Liverpool*, and who has accepted them, the bill of lading making them deliverable he "paying freight for them five eighths of a penny sterling per pound, with 5*l.* per cent. primage, and average accustomed," the latter may lawfully claim to retain from 138*l.* 11*s.* 3*d.*, the amount of the freight at the rate specified, 1*l.* 16*s.* 3*d.*, on the ground that, by the custom of *Liverpool*, he is entitled to a deduction of three months' discount from the freight. It is admitted

(a) 4 Q. B. 260.

that the custom exists in fact, in regard of shipments from *New Orleans*, and some other ports in the southern states of the *American Union*, to *Liverpool*: but it is objected to as bad in law, because it is inconsistent with the written document, the bill of lading. Five eighths of a penny on the weight of the cargo is, it is said, equal to 138*l.* 11*s.* 3*d.*: the bill must be read as if that sum were specified in it; and this custom, if allowed, will change it to 136*l.* 15*s.*

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The principles on which this case is to be decided are perfectly clear: the difficulty lies in the application of them to the facts. Mercantile contracts are very commonly framed in a language peculiar to merchants: the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large: evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts, as to the subject matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to

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exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less. Neither, in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than "a thousand," "a week," "a day?" Yet the cases are familiar in which "a thousand" has been held to mean twelve hundred, "a week" a week only during the theatrical season, "a day" a working day (*a*). In such cases the evidence neither adds to, nor qualifies nor contradicts the written contract; it only ascertains it, by expounding the language. Here the contract is, to pay freight on delivery at a certain rate per pound: is it inconsistent with this to allege that, by the custom, the ship owner, on payment, is bound to allow three months' discount? We think not. The written contract expressly settles the rate of payment: the custom does not set this aside; indeed it adopts it, as that upon which it is to act, by establishing a claim for allowance of discount upon freight to be paid after that rate. The consignee undertakes to pay freight on delivery after that rate; the ship owner undertakes to allow three months' discount on freight paid after that rate; the latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed, or if, from the language of it, the intention of the parties could have been collected, that

(a) See *Smith v. Wilson*, 3 B. & Ad. 728; *Grant v. Maddox*, 15 M. & W. 737 *Cochran v. Retberg*, 5 Esp. N. P. C. 121.

the freight at the specified rate should be paid, free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom, and the case would have been brought within the restriction mentioned above. *Webb v. Plummer* (a) and *Hutton v. Warren* (b) are cases which illustrate this principle. In the first of these, by the custom of the country the outgoing tenant was bound to do certain acts, and entitled to receive certain compensation; but the lease which formed the written contract bound him to do the same acts in substance, and specially provided for his payment as to some of them, omitting the others: and the Court held that the expression as to some excluded the implication as to the remainder, and that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned and *no more*. The custom therefore would have been repugnant to the contract. But in the latter case, in which the former was expressly recognised, the Court held that a specific provision, as to a matter dehors the custom, left the custom untouched and in full force. This latter case appears to us like the present: the contract settles the rate of freight: whether or not discount is to be allowed on the payment, it leaves open; and to that the custom applies.

Our determination on this point makes it unnecessary to say anything as to a difference which was contended for by the defendant between the original shipper and the indorsee of the bill of lading.

We are of opinion that judgment should be entered for the defendant.

Judgment for the defendant.

(a) 2 B. & Ald. 746.

(b) 1 M. & W. 466.

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*Monday,
May 29th.*

Ex parte MAWBY.

Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, this Court refused to grant a mandamus ordering a fresh election. Though the persons, whose votes had been rejected, were parties to the application.

LUSH moved for a rule, calling on the vicar and churchwardens of the parish of *Bowin*, in *Lincolnshire*, to shew cause why a mandamus should not issue, commanding them to convene a meeting of the inhabitants in vestry, for the election of a churchwarden for the remainder of the present year.

It appeared by affidavit that, pursuant to the provisions of stat. 13 & 14 *Vict. c. 99. (a)*, the inhabitants of the parish in vestry assembled, about 12th *September*, 1850, duly declared and ordered that the owners of tenements in the parish, the yearly rateable value whereof should not exceed 6*l.*, should be rated and assessed to the rates for the relief of the poor in respect of such tenements, instead of the occupiers thereof; and that such order had never been rescinded, and still remained in full force. The affidavit set out extracts from an assessment for the relief of the poor, made 27th *March* 1854, by which it appeared that the rating had been made in conformity with the order.

The custom of the parish was, annually, on *Easter Monday*, to elect the two churchwardens for the ensuing year; one of whom was appointed by the vicar, and the other by the parishioners duly assembled in vestry for such purpose.

On *Easter Monday*, 17th *April*, 1854, a vestry was convened for the purpose of such election. The vicar presided, and named one person as vicar's churchwarden: and *Robert Nicholas Munton* and *Robert Mawby* were

(a) "For the better assessing and collecting the poor rates and highway rates in respect of small tenements." See sect. 1.

duly proposed and seconded for the office. The show of hands was declared to be in favour of *Munton*: a poll was demanded, and held on the following day; to which time the vestry was adjourned, and at which adjourned vestry the vicar presided. Votes were then tendered on behalf of *Mawby* by seven persons named in the affidavit, who occupied tenements whereof the rateable value did not exceed 6*l*., and whereof the owners were assessed in the rate of 27th *March* 1854. The chairman rejected these votes, and decided that the occupiers of such tenements were not entitled to vote in the election of churchwarden. The seven were all rated to the church-rates made for the parish, and had paid the same. (It did not appear by affidavit, but was assumed in the discussion, that *Munton* had the majority of votes, and had been declared duly elected; the affidavits were silent as to whether the votes rejected would or would not have altered the result.)

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Lush, in support of his motion. The votes were improperly rejected. Sect. 6 of stat. 13 & 14 *Vict. c. 99.* enacts: "That every such owner so rated as aforesaid shall have the same right of appeal (subject to the same conditions) against rates, and the same right to vote in vestry, as if he were an occupier duly rated in respect of the same tenement." That, however, does not relate to vestry meetings convened for the election of churchwardens. By sect. 9, "the word 'vestry' shall be construed to include any meeting of the inhabitants of any such parish, township, vill, or place, to be held after due notice for carrying into execution the laws for the relief of the poor." The parishioners are the parties to elect the churchwarden; 1 *Burn's Eccl. L.* 401. tit. *Churchwardens*, iii. They cannot lose their right by

1854. not being rated to the poor rate or highway rate (a), to
 Ex parte which rates alone stat. 13 & 14 Vict. c. 99. applies.
 MAWBY. [Coleridge J. I do not see how the question can be
 raised in this form. Lord Campbell C. J. Do you say
 that the election which has taken place was entirely
 void?] In *Rex v. The Rector &c. of Birmingham* (b)
 this Court held that a mandamus was the proper
 mode of questioning the election. [Lord Campbell
 C. J. In that case, the proceedings were such that
 there appeared not to have been even what amounted to
 an election de facto: you must go so far as to say that
 the election here would be entirely void if a single vote
 was improperly rejected.] That would follow, certainly.
 No other remedy can be discovered. [Coleridge J. Can
 you not object to the swearing in of the other candidate?
 Crompton J. A mandamus has gone in such cases (c) to the
 archdeacon, commanding him to swear in.] His duty is
 to swear in both claimants. The right to vote is temporal.
 In *Rex v. The Rector &c. of Birmingham* (b) Lord Den-
 man refers to *Rex v. Shepherd* (d), where it was held
 that no quo warranto lay in respect of the office of
 churchwarden. [Erle J. Suppose the fact here to be
 that, even if the votes had been received, *Munton* would
 have had the majority.] The application is made on
 behalf of the rejected voters as well as of the candidate.
 [Crompton J. Can there be a mandamus merely be-
 cause votes have been improperly rejected, where that
 has not led to the declaration of a candidate, as duly
 elected, who would have failed if the votes had been
 received? Erle J. Might you not bring an action for

(a) See sect. 3.

(b) 7 A. & E. 254.

(c) See *Ex parte Winfield*, 3 A. & E. 614; *Rex v. The Archdeacon of Middlesex*, 3 A. & E. 615; *Ex parte Duffield*, 3 A. & E. 617.

(d) 4 T. R. 381.

the rejection of the vote, as in the case of an election of members of Parliament? *Crompton J.* Or suppose the votes tendered and rejected, and the opposing candidate sworn in: might not his acts be resisted, or an action brought for what he may do?]

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LORD CAMPBELL C. J. I do not undertake to say what can be done in this case: but clearly we cannot issue a mandamus. That goes on the supposition that what has been done is void: such was the case in *Rex v. The Rector &c. of Birmingham (a)*, where there had been riotous proceedings, and the Court held the supposed election merely void.

COLERIDGE J. I agree that this is a safe ground of decision in this case: the election is not shewn to be void. It does not appear that the result would have been altered by the admission of the votes. Mr. *Lush* was compelled to contend that the rejection of a single vote would authorize a mandamus.

ERLE J. concurred.

CROMPTON J. It is clear that the mere rejection of votes furnishes no ground for our interfering by mandamus, where it does not appear that the election has been vitiated.

Rule refused.

(a) 7 A. & E. 254.

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CATHERINE DASSEY *against* ELIZABETH FRANCES
RICHARDSON.

Where a rule for a new trial drops, on account of the Court being equally divided in opinion, no costs of the rule are to be allowed to either party.

IN this case, the defendant at the trial had a verdict. A rule Nisi for a new trial was granted; but, the Court being equally divided, no order was made; and, in last *Hilary* Term, the rule dropped (a). On taxation, the Master refused to allow the defendant the costs of the rule for a new trial. *Maule J.*, at Chambers, made an order that he should review his taxation.

Pearson, in last *Easter* Term, obtained a rule Nisi to set aside the order of *Maule J.* He referred to *Chilton v. London and Croydon Railway Company* (b).

(a) See *DASSEY v. Richardson*, ante, p. 144.

(b) In the Exchequer, *Trinity* Term, 1848 (not reported). From counsel's brief used in that cause it appears that the plaintiff had obtained a verdict; a rule Nisi for a new trial had been granted; and, the Court of Exchequer being equally divided, no order was made; and the rule dropped. The Master having taxed the plaintiff's costs, the defendants took out a summons to review the taxation, amongst other reasons, because "the Master had erroneously decided that the plaintiff was entitled to the costs of appearing upon and shewing cause against the rule Nisi for a new trial, inasmuch as that, by reason of the Judges of this Honourable Court being equally divided in opinion as to whether the said rule should be made absolute, such rule had been dropped."

Parke B. made an order, upon this summons, that the Master should review his taxation, on this ground as well as others.

Sir F. Thesiger moved to rescind the order of *Parke B.*: but the Court refused a rule.

Sir F. Thesiger took nothing by his motion.

Lush, in the same Term, *May* 10th (*a*), shewed cause. The general rule is that the successful party is entitled to costs. [Lord *Campbell* C. J. That is true; and in the House of Lords, when the Lords are equally divided, the respondent is successful; for a decision in his favour is made on the principle *Semper præsunitur pro negante*. But, when this Court is equally divided on a rule, there is no decision, and no successful party.]

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Pearson, in support of his rule, relied on *Chilton v. London and Croydon Railway Company* (*b*). [Lord *Campbell* C. J. As the question affects all the Courts, we will take time to consider.]

Cur. adv. vult.

LORD CAMPBELL C. J., in this Term (*May* 29th), delivered judgment. This rule must be absolute. The Court being equally divided in opinion, there was no decision on the rule, and no successful party; and these costs were properly disallowed. *Chilton v. London and Croydon Railway Company* (*b*) is precisely in point.

Rule absolute.

(*a*) Before Lord *Campbell* C. J., *Wightman, Erle* and *Crompton* Js.

(*b*) Ante, note (*b*) p. 722.

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Monday,
May 29th.MATTHEW TAYLOR *against* ROBERT WILLIAM
MILNES NESFIELD, Esq.

Plaintiff declared against defendant for maliciously and without reasonable or probable cause issuing a warrant under his hand and seal, and procuring plaintiff to be arrested. Plea: Not Guilty, by stat. 11 & 12 Vict. c. 44. s. 10. The notice of action stated, as cause of action, that defendant, with force and arms, caused plaintiff to be assaulted and beaten, apprehended and imprisoned, without reasonable or probable cause (not alleging malice).

The evidence was that defendant, being a justice, in a matter within his jurisdiction, issued a warrant under which plaintiff was apprehended; and it was sought to shew that this was done maliciously.

Held: not a good notice under sect. 9 of stat. 11 & 12 Vict. c. 44., as the cause of action insisted on was under sect. 1, but the notice did not point clearly and explicitly to such a cause of action, but rather to a complaint under sect. 2, for acting without jurisdiction.

THE first count of the declaration was for assault and battery.

The second count charged that defendant, on 3d November 1853, maliciously, and without reasonable or probable cause, issued a warrant under his hand and seal, for the apprehending of the plaintiff, and for bringing him before one or more of Her Majesty's justices of the peace for the county of *Derby*, to answer to a charge of assault, falsely alleged to have been made by the plaintiff upon one *James Dove*: and the defendant afterwards, on the same day, maliciously and without reasonable or probable cause, procured the plaintiff to be arrested by his body, and to be imprisoned and kept and detained in prison for a long space of time, to wit &c., until the said defendant afterwards, to wit on &c., maliciously and without reasonable or probable cause, procured the plaintiff to be brought before *G. C. C.* and *J. P.*, two of Her Majesty's justices of the peace for the county of *Derby*, to be examined touching the said charge: whereupon the plaintiff was committed for trial at Her Majesty's

Court of Quarter Sessions for the county of *Derby*, and was admitted to bail. And the defendant afterwards, to wit on 3d *January* 1854, at the Quarter Sessions held in and for the same county on that day, maliciously and without reasonable or probable cause, procured a bill of indictment to be exhibited against the plaintiff for the said alleged offence of the plaintiff unto the jurors of the grand inquest there, and which said bill of indictment was then there returned to the said justices of the said Quarter Sessions, by the said jurors, Not found: and the said prosecution was, before the commencement of this suit, and now is, ended and determined. Damages alleged &c.

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NESFIELD.

Pleas. 1. Not guilty, by statute (11 & 12 *Vict. c. 44. s. 10.*). Issue thereon.

2 and 3, to the first count, justifications; on which plaintiff took issue.

On the trial, before *Jervis C. J.*, at the last Assizes for *Derbyshire*, the case for the plaintiff, as to the second count, was that the defendant was a justice of *Derbyshire*, and had maliciously issued the warrant complained of in a matter wherein he had jurisdiction; and that, on this warrant, plaintiff had been apprehended. No other proof was given of the interference of the defendant, as to the matter in the second count. The plaintiff, a calendar month before the commencement of the action (which commencement was within six calendar months of the act complained of), had served the defendant with the following notice of action.

“*R. W. M. Nesfield*, Esquire, acting as one of Her Majesty’s Justices of the Peace for the county of *Derby*.

“Sir, I *Matthew Taylor*, of” &c., “do hereby,

1854. according to the form of the statute in such case
TAYLOR made and provided, give you notice that I shall, at
v. or soon after the expiration of one calendar month
NESFIELD. from the time of your being served with this notice,
cause a writ of summons to be sued out of Her
Majesty's Court of Queen's Bench at *Westminster*,
against you, at my suit, and proceed thereon according
to law: For that you, the said *R. W. M. Nesfield*,
on the 3d day of *November* last past, with force and
arms, caused me to be assaulted, beaten and ill treated
by one *James Dove*, to wit at *Bakewell* aforesaid, and
also then caused me to be apprehended and seized
and laid hold of, and to be forced and compelled to
go into, through and along divers public highways,
streets and places, to a certain lockup or prison at
Bakewell aforesaid, and to be unlawfully imprisoned, and
kept and detained in prison, in a certain dark and
unwholesome prison or place, without any reasonable or
probable cause whatsoever, for a long space of time, to
wit for the space of one night and a day then next
following, contrary to the law and custom of this realm,
and against the will of me, the said *Matthew Taylor*.
Whereby I, the said *Matthew Taylor*, was then not only
greatly hurt and injured, but was also thereby greatly
exposed and injured in my credit, character and cir-
cumstances. Dated this 6th day of *January*, 1854.

"Yours &c., *Matthew Taylor*, of" &c.

The counsel for the defendant objected that this notice was insufficient. The Lord Chief Justice considered the objection valid, and directed the jury to confine their verdict to the first count. Verdict for the plaintiff on the first count; damages, one farthing: for defendant on the second.

In last *Easter* Term, *Macaulay*, on behalf of the

plaintiff, obtained a rule Nisi for a new trial, on the ground of misdirection.

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Mellor and *G. Hayes* now shewed cause. The notice is insufficient, as it does not contain the word "maliciously." It is not denied that the justice acted within his jurisdiction; and by sect. 1 of stat. 11 & 12 *Vict. c. 44.* it is enacted that in such case the action "shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause:" and, if such allegation be not proved, there is to be a nonsuit or verdict for the defendant. By sect. 9, "no such action shall be commenced against any such justice of the peace until one calendar month at least after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode, by the party intending to commence such action, or by his attorney or agent, in which said notice the causes of action, and the Court in which the same is intended to be brought, shall be clearly and explicitly stated." It was therefore necessary clearly and explicitly to state malice, inasmuch as without malice there was no cause of action. The justice is entitled to know the character of the act imputed to him. In *Towsey v. White* (a) an action was brought for a penalty of 100*l.* under stat. 3 *G. 4. c. 126. s. 65.*, alleged to be incurred by the defendant having, while acting as trustee of a turnpike road, let a horse and cart for the use of the road. Sect. 143 of that Act provides that penalties exceeding 20*l.* may be recovered by action provided twenty one days' notice of action be given. The

(a) 5 *B. & C.* 125.

1854. penalty, by sect. 65, was imposed upon any party
 TAYLOR letting a horse &c. for hire "for the use of any turn-
 V. pike road for which he shall act as a trustee;" the notice
 NEEFIELD. stated only that, "*being* one of the trustees," defendant
 let for hire: and this was held a bad notice. Under
 stat. 24 G. 2. c. 44. s. 1. a notice of action against
 a justice of the peace is insufficient, unless it state what
 the writ and process is to be; *Lovelace v. Curry* (a),
 where *Strickland v. Ward* (b) was relied on. [Erie J.
 I read this notice as one of an action to be brought, not
 under sect. 1 of stat. 11 & 12 Vict. c. 41., but under
 sect. 2, in the nature of trespass, for acting without juris-
 diction.] It is not necessary now to consider whether
 any and what notice was necessary on the first count.
 [Lord Campbell C. J. Besides the omission of allega-
 tion of malice, it is not stated in the notice that the
 act done was within defendant's jurisdiction.] That is
 another objection: the notice entirely fails to inform
 the defendant what it is with which he is charged:
 he is not even told that the complaint is founded on his
 issuing a warrant.

Macaulay and *J. H. Brewer*, contra. The notice
 fully explains the injury which the plaintiff has suffered
 from the defendant: namely, that the defendant is the
 party through whom the plaintiff has been apprehended,
 and that the defendant has therein acted
 without reasonable or probable cause. That, in ordi-
 nary understanding, shews a malicious acting: these
 notices are not to be discussed as if they were the subject
 of special demurrers. The object of the enactment is,
 that the defendant may tender amends, which he can

(a) 7 T. R. 631.

(b) 7 T. R. 631, note (c); 633, note (a).

do when he is fully informed of the nature of the complaint: and he knows that, under sect. 1, malice is an essential ingredient of the offence described in the notice. In 2 *Chitty on Statutes*, 2d edit., 712 note (e), it is said, of the notice under stat. 24 G. 4. c. 44. s. 1., "It is quite sufficient if it calls the attention of the defendant to the general nature of the injury, and that he may know what the ground of complaint is." *Towsey v. White* (a) was a penal action; and a strict construction was therefore adopted: and the liability was very special; for a party who was a trustee, but did not act, would not be liable.

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LORD CAMPBELL C. J. I should have striven to support this notice against the objection that the word "maliciously" is not inserted, if that had been the only objection. But it appears to me that the cause of action is not stated in the notice. Nothing is "clearly and explicitly stated," shewing a complaint under sect. 1. On the contrary, the notice seems to me clearly to shew a complaint under sect. 2, a cause of action, sounding in trespass, for something done without or in excess of jurisdiction. It is not only defective, but it uses language calculated to mislead the defendant. I think, therefore, that the plaintiff could not avail himself of the second count.

COLERIDGE J. I am of the same opinion. The cause of action is to be "clearly and explicitly stated." I cannot find that this statement, if strictly construed, is clear and explicit, inasmuch as it omits matters made essential by sect. 1, which enacts that the action shall

(a) 5 B. & C. 125.

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be in the case, and that the declaration shall express the act to be done maliciously and without reasonable and probable cause. I should be sorry, however, to introduce what Mr. *Macaulay* characterizes as a mode of construing notices as if on special demurrer. I ask, therefore, does this notice shew, I do not say the circumstances of the case, but what the defendant is sued for? The question is, not what was in the magistrate's mind, but what he is to be charged with. Now here sects. 1 and 2 describe different causes of action: and the notice is so framed that it meets sect. 2, but not sect. 1. How then can it be said to be good notice of an action brought under sect. 1? We must follow the Act, and hold the notice to be insufficient.

ERLE J. I also think that this notice is bad for not shewing what the defendant is charged with, and that the act charged was malicious. If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of motive; and, to establish this, the act must be shewn to be malicious. If, with the knowledge which I have of the statute, I were to construe this notice, I should infer that it was of an action under sect. 2.

CROMPTON J. I am of the same opinion. I think the Chief Justice was quite right in holding this notice to be bad. In fact it was very likely to mislead: the defendant might well suppose he was charged with acting without jurisdiction; the notice certainly would more naturally be understood to charge that, than an act comprehended under the first section.

Rule discharged.

1854.

LANE and others *against* HOOPER and another. *Monday.*
May 29th.

THE following facts appeared on affidavit.

That the Court of Exchequer Chamber, on a bill of exceptions, having ordered a venire de novo in this case (a), it was again tried, on 25th May 1850, before Lord Denman C. J.; when the defendants tendered a bill of exceptions, and a verdict was found for the plaintiffs; and judgment was entered up in this Court for the plaintiffs. Error upon this judgment was brought by defendants in the Exchequer Chamber; and the judgment of this Court was there affirmed.

“That, on the 17th day of *January*, 1853, such judgment having been entered, the defendants proceeded to error, pursuant to The Common Law Procedure Act, 1852 (b). That the plaintiffs’ case and appendix was thereupon prepared and printed, ready for delivery: but, doubts having arisen with the authorities of the judicial department of the House of Lords, as to whether The Common Law Procedure Act applied to proceedings in the High Court of Parliament, those gentlemen desired to take the opinion of Lord *Campbell* thereon: and some considerable time was consumed in so doing. That, Lord *Campbell* being of opinion that the Act did apply, the defendants’ attorney, on the 14th day of *February* last, gave the plaintiffs’ attorney notice that

Error having been brought in Parliament upon a judgment of the Exchequer Chamber on a record of this Court, this Court, under sect. 155 of The Common Law Procedure Act, 1852, ordered the Masters to take the record itself to the clerk of the judicial department of the House of Lords, and leave it with him, taking a receipt, and an undertaking for the return of the same when the case should be decided.

(a) *Hooper v. Lane*, 10 Q. B. 546.

(b) Stat. 15 & 16 Vict. c. 76. s. 148., &c.

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he had required the Masters of this Honourable Court to produce the judgment roll in the Court below to the High Court of Parliament on *Friday* the 17th day of *February* last." That the Masters "had sent the judgment roll to the Parliamentary Office by a clerk, to produce it to the proper authorities there; but with a positive injunction not to part with it: but, this being considered insufficient, inasmuch as there were no proceedings in this cause in the office upon which they could act, they declined to take cognizance of the matter." That afterwards one of the Masters stated "that they had come to the resolution not to part with the records in their custody, without the express authority of the Court." That, on 13th *March* last, the said Master stated that he had written to Lord *Campbell*; and that his Lordship had replied by stating that he had seen Mr. *Labouchere* on the subject of his letter, and that it would receive immediate consideration. That the matter still remained in the same state: and that both plaintiffs and defendants had been ready, since the said 14th *February*, to proceed with the hearing in the House of Lords.

Dowdeswell now, on the part of the plaintiffs, moved, upon these facts, that the officers of this Court should be authorized to leave the record with the clerk of the House of Lords, or that such other mode might be adopted as this Court should think fit. [Lord *Campbell* C. J. Formerly the record used to be taken up to the House of Lords.] Yes; and it was accompanied by a transcript; and then the record and transcript were compared; and the transcript was left, and the record

brought back. Now, by sect. 148 of The Common Law Procedure Act, 1852, the writ of error is abolished; and, by sect. 155, "the judgment roll shall, without any writ or return, be brought by the Master into the Court of Error," and, "if the proceedings in error be before the High Court of Parliament, then before the High Court of Parliament, before or at the time of its sitting." [Lord *Campbell* C. J. The officers of this Court had a prudent care of our record: the clerk of the House of Lords spoke to me on the subject, and said that our record should be taken care of. It must come back to us: but, in the meanwhile, I think we may authorize our officer to leave it with the clerk of the House of Lords.]

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Per *CURIAM* (a).

Ordered: "That the Masters of this Court do produce, and leave with the clerk of the judicial department of the House of Lords, the judgment roll in this cause; the said Masters taking a receipt for the same, and also an undertaking for the return thereof when the case is decided."

(a) Lord *Campbell* C. J., *Coleridge*, *Erie* and *Crompton* Js.

1854.

Monday,
May 29th.

The QUEEN against STURGE.

On the trial of an indictment charging defendant with obstructing a footway leading from *A.* to *C.*, it appeared that there was a way leading from *A.* to *C.*, but that it passed through an intermediate point *B.*, and that the way was a carriage way from *A.* to *B.* and a footway only from *B.* to *C.* The obstruction was between *B.* and *C.* Held that, assuming this to be a misdescription, the indictment might, under stat. 14 & 15 Vict. c. 100. s. 1., be amended at the trial, by substituting a description of the way as a footway leading from *B.* to *C.*

THE indictment charged that defendant, on &c., at the parish of *Northfleet*, in *Kent*, "in and upon a certain highway there, being a common and ancient public footway, leading, from out of the turnpike road between *Dartford* in the said county and *Gravesend* in the said county, towards, unto and over and along a part of the shore of the river *Thames* called the *Hard*, in the said parish of *Northfleet*, and, over and along a certain other part of the said parish of *Northfleet*, towards, unto and into the town of *Gravesend* in the said county, used for all the liege subjects of our Lady the Queen to go, return, pass and repass, on foot, every year, and at all times of the year, at their free will and pleasure, unlawfully and injuriously did dig" pits and holes, and erect posts and rails, and deposit large quantities of stones &c., and continue, and still doth continue, &c., "in and upon the said common public footway; whereby the said common public footway," on &c., was and still is obstructed &c., so that the liege subjects could not, on &c., "go, return, pass and repass, in, through, along and over the said footway, as they were before used" &c., and still &c.: to the damage of all the liege subjects "going, returning, passing and repassing over and along the said footway" &c.

Plea: Not guilty. Issue thereon.

On the trial, before *Parke B.*, at the last *Kent Assizes*, it appeared that the highway in question led, as described

in the indictment, from the turnpike road between *Dartford* and *Gravesend* into the town of *Gravesend*. Between these termini, it passed over a hill called *Orme House Hill*; and it appeared that, from the said turnpike road to the top of *Orme House Hill*, the highway in question was a carriage way; but from thence to the town of *Gravesend* it was a footway. The alleged obstruction was on the part between *Orme House Hill* and the town of *Gravesend*. It was objected, on the authority of *Rex v. St. Weonard's* (a), that this was a misdescription. It was contended, in answer, that, if the carriage way was also a footway, there was no misdescription; and, further, that the misdescription, if there was one, was amendable under stat. 14 & 15 *Vict. c. 100. s. 1.*, and that there should be substituted a description of a footway running from *Orme House Hill* to *Gravesend*. The learned Judge proposed to direct a verdict for the defendants on this objection, if it should become necessary, reserving leave to move to enter a verdict for the Crown, if it should be considered by the Court either that there was no misdescription, or that it was amendable; to which the counsel on both sides acceded. The case was then left to the jury on the merits; and they found for the Crown. His Lordship then directed that the verdict should be entered for the defendants.

In last *Easter Term*, *M. Chambers* obtained a rule *Nisi* for entering a verdict for the Crown, and for making the amendment.

Bramwell and *Lush* now shewed cause. The question as to the amendment is, Whether this is a variance in an

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(a) 6 C. & P. 582.

1854. indictment, "in the name or description of any matter
The QUEEN or thing whatsoever therein named or described," within
v. the meaning of stat. 14 & 15 Vict. c. 100. s. 1. The
STURGE. words of the section are, no doubt, very general; but
they must be construed together with the preceding
words of the same section; and these relate to names of
persons or things, and not to a description referring the
subject matter to a class to which it does not belong.
This is not a misdescription of a given thing, but a
naming of one thing instead of another. It must be
admitted that the defendants were not prejudiced in
their defence by the misdescription.

W. Rose, contra, was not called on.

LORD CAMPBELL C. J. This appears to me to be the
very sort of case for which the Legislature meant to
provide. It is a variance in the description "not material
to the merits of the case;" and "the defendant cannot
be prejudiced" by the amendment "in his defence on
such merits."

COLERIDGE and ERLE Js. (a) concurred.

Rule absolute.

(a) *Crompton J.* had left the Court.

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WILLIAM WESTBROOK *against* SARAH BLYTHE.Tuesday,
May 30th.

THE following case was stated for the opinion of this Court.

This is an action of ejectment, brought to recover the possession of certain houses and land at *Tottenham*, in the county of *Middlesex*, of which one *Charles Ansell* was seized in fee. The premises sought to be recovered were demised by the said *Charles Ansell*, by two indentures of lease, respectively dated the 12th day of *March* 1852, to *John Bennington Blythe*, to hold the same to him, his executors, administrators and assigns, for ninety nine years, from the 24th day of *June* 1851, at the rent therein named. These deeds were duly registered in *Middlesex*, on the 17th day of *March* 1852. By indenture of mortgage dated the 8th day of *May* 1852, after reciting the above leases, the said *John Bennington Blythe* bargained, sold, assigned and set over unto *William Westbrook*, the plaintiff, all and singular the ground, messuages and premises comprised in the said indentures of lease, to hold the same unto the said *William Westbrook*, his executors, administrators and assigns, for the then resi-

Ejectment for lands in *Middlesex*. On a case stated it appeared that *A.*, being possessed of a term for ninety nine years in the lands, conveyed it by way of mortgage to the plaintiff on 19th *June* 1852. The mortgage was registered in *Middlesex* on 28th *June*. Defendant, on 5th *June* 1852, obtained a judgment in the Queen's Bench against *A.* On the same day the judgment was registered in the Common Pleas: it never was registered in *Middlesex*. On 8th *September* 1852, an elegit

issued; and the lands were delivered to defendant.

Held: that the judgment was a charge on lands in general, under stat. 1 & 2 *Vict. c. 110. s. 13.*, from the time it was registered in the Common Pleas, but that, by stat. 2 & 3 *Vict. c. 11. s. 5.*, it had no further effect against a *bonâ fide* purchaser, for value and without notice, than a docketed judgment before stat. 1 & 2 *Vict. c. 110.* That a docketed judgment would not, before that Act, have bound a term for years until execution; and consequently that the plaintiff, being a *bonâ fide* purchaser of this term of years before the execution, was entitled to the lands as against the defendant, the judgment creditor.

Held also that, these lands being in *Middlesex*, the judgment, though registered in the Common Pleas, did not bind the lands till a memorial was registered in *Middlesex* under stat. 7 *Ann. c. 20. s. 18.*

For both reasons plaintiff had judgment.

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dues of the several terms granted by the said two leases, subject to a proviso for redemption on payment of the sum of 700*l.*, and interest, on the 8th day of *November* then next. By indenture, dated the 18th day of *June* 1852, and made between the said *John Bennington Blythe* of the one part, and the said *William Westbrook*, the plaintiff, of the other part, after reciting the above stated mortgage of the 8th day of *May* 1852, the said *John Bennington Blythe*, in consideration of 100*l.* advanced to him by the said *William Westbrook*, covenanted that the said land, houses and premises should stand charged with the further sum of 100*l.* and interest, in addition to the said sum of 700*l.* The last two deeds were both executed on the 19th day of *June* 1852, and registered in *Middlesex* on the 28th day of *June* 1852. The said sum of 700*l.* was advanced by the said *William Westbrook*, the plaintiff, to the said *John Bennington Blythe*, prior to the 8th day of *May* 1852; and the said sum of 100*l.* was paid to the said *John Bennington Blythe* on the 19th of *June* 1852.

The defendant *Sarah Blythe* obtained a judgment in the Queen's Bench against the said *John Bennington Blythe* for 867*l.* 2*s.*, on the 5th of *June* 1852; and, on the same day, the said judgment was registered in the Common Pleas office for registering judgments. The said judgment has never been registered in the *Middlesex* registry. On the 8th of *September* 1852 an elegit was issued on the said judgment; and the same was executed and returned by the sheriff of *Middlesex* on the 20th day of the same month. The two sums of 700*l.* and 100*l.* remained due to the plaintiff *William Westbrook* on the security of the said two indentures of mortgage and further charge.

The question for the opinion of the Court is, Whether, upon the facts stated in this case, the plaintiff or the defendant is entitled to the premises? If the Court should be of opinion that the plaintiff is, then the judgment to be entered for the plaintiff: but, if the Court should be of opinion that the plaintiff is not so entitled, the judgment to be entered for the defendant.

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The cause was argued in last *Michaelmas* Term (a).

Butt, for the plaintiff. The judgment has never been registered under stat. 7 *Ann. c. 20. s. 18.*; and therefore, unless that Act is repealed, it cannot affect lands in *Middlesex*. The defendant relies on stat. 1 & 2 *Vict. c. 110. s. 13.* That enactment is modified by stat. 2 & 3 *Vict. c. 11. s. 5.* and by stat. 3 & 4 *Vict. c. 82. s. 2.* The effect of those statutes on judgments, as affecting lands in counties at large, is discussed in *Sugden's Concise and Practical View of the Law of Vendors and Purchasers*, 383. But at all events they do not repeal the Registration Acts in *Yorkshire* and *Middlesex*; *Johnson v. Holdsworth* (b).

W. H. Watson, contra. Stat. 1 & 2 *Vict. c. 110. ss. 11., 13.* causes a judgment to be a charge on all lands, including leaseholds. Then stat. 2 & 3 *Vict. c. 11. s. 5.* is relied on by the other side. That section provides that no judgment, although registered, shall have more effect under stat. 1 & 2 *Vict. c. 110.* against a purchaser without notice than it would have had before that Act, if duly docketed. The intention was to give

(a) On *Friday, November 11*; before Lord Campbell C. J., *Coleridge* and *Wightman* Js.

(b) 1 *Sim. N. S.* 106.

1854. purchasers the same protection which they had before ;
WESTBROOK but, according to the plaintiff's construction, this pro-
v. vision revives the old law, and half the freehold is to
BLYTHE. be taken as under an old docketted judgment, and the
leasehold is not to be bound at all till execution ; for
before stat. 1 & 2 *Vict. c. 110.* it was not bound till then.
That cannot have been the intention of the Legislature.
The operation of stat. 2 & 3 *Vict. c. 11. s. 5.* is to give
purchasers without notice the same rights to equitable
relief which they had before stat. 1 & 2 *Vict. c. 110.*
Stat. 1 & 2 *Vict. c. 110.* is general, and must override
the *Middlesex* Registration Act.

Butt was heard in reply.

Cur. adv. vult.

Lord CAMPBELL C. J. now delivered the judgment of
the Court.

In this case, the plaintiff *Westbrook* claimed to be
entitled to the lands in question, by virtue of a mort-
gage of two terms, for ninety nine years respectively,
made by *John Blythe* on the 19th *June* 1852, of lands in
Middlesex, which mortgage was registered on 28th *June*
1852.

The defendant, *Sarah Blythe*, claimed to be entitled
by virtue of a judgment against the said *John Blythe*,
registered in Common Pleas on 5th *June* 1852, and an
elegit, issued thereon on the 5th *September* 1852, and
contended that the terms were made liable to execution
by stat. 1 & 2 *Vict. c. 110. s. 11.*, which makes it lawful
for the sheriff, under an elegit, to take all such lands as
the person, against whom the execution issued, was
possessed of at the time of entering up judgment.

This judgment was entered up on the 5th *June* 1852: and, at that time, *John Blythe* was possessed of these terms; and terms are lands within this section. Therefore this defence would prevail, unless there be an answer. And the plaintiff has two answers; both of which we consider valid.

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First, he contends that, as he was a purchaser for value, without notice of the judgment, before the *elegit* issued, the registered judgment has no further effect on the land from that which a docketed judgment before stat. 1 & 2 *Vict. c. 110.* would have had; and for this he relies on stat. 2 & 3 *Vict. c. 11. s. 5.* Now a docketed judgment, before stat. 1 & 2 *Vict. c. 110.*, did not bind leasehold lands until an *elegit* was awarded: see *Sir Gerrard Fleetwood's Case* (a), *Burden v. Kennedy* (b), *Sugden On Vendors and Purchasers*, vol. 3, p. 335, 6 (10th ed.) (c). Therefore a registered judgment, under stat. 1 & 2 *Vict. c. 110.*, does not bind them against a purchaser for value, without notice, until an *elegit* is awarded. The words of stat. 2 & 3 *Vict. c. 11. s. 5.* are unlimited. A registered judgment shall not "bind or affect any lands," "or any interest therein, further or otherwise or more extensively in any respect," than a former docketed judgment would have done. If leasehold lands, which were not before affected by a docketed judgment, were to be affected by a registered judgment, it seems to us that the express words of the statute would be contradicted. In *Sugden On Vendors and Purchasers*, vol. 2. p. 401 (10th ed.) (d) it is said leasehold estates are now bound in like manner as freehold; but that is said in reference to stat. 1 & 2 *Vict. c. 110.*, and not to stat. 2 & 3 *Vict. c. 11. s. 5.* This

(a) 8 *Rep.* 171 a.

(b) 3 *Atk.* 739.

(c) P. 959. ed. 11.

(d) P. 667. ed. 11.

1854. ~~answer applies equally to any claim of the defendant on~~
 WESTHOODS the ground of the judgment operating as a charge by
 v. stat. 1 & 2 Vict. c. 110. s. 13., the plaintiff having ac-
 BRYNE quired the legal estate before the *elegit*.

For his second answer, he relies on the *Middlesex* Registration Act, 7 Ann. c. 20. s. 18., enacting that no judgment shall affect or bind any lands in *Middlesex*, but only from the time that a memorial of such judgment shall be entered at the Register Office. Here the judgment was not entered at the Register Office for *Middlesex*. It is clear that such a leasehold as the plaintiff's is comprised within the Act, as the only leaseholds excepted are by sect. 17, and they are leases at rack rent, and leases not exceeding twenty one years, whereas the present lease is not at rack rent, and does exceed twenty one years. It was contended that the section requiring registration of a judgment in *Middlesex* was in effect repealed by stat. 1 & 2 Vict. c. 110. s. 13., enacting that a judgment shall charge the land from the time of registration in the Common Pleas, as if a charge had been executed by the tenant. But we think the two statutes can be read together, and carried into effect, by holding that a judgment registered in the Common Pleas will have the effect of a charge upon land in *Middlesex*, only from the time that the judgment has been also registered in the registry for *Middlesex*.

As we consider each of these answers to be sufficient to defeat the claim of the defendant, it is unnecessary to inquire further into the remedies upon the charge created by the judgment under stat. 1 & 2 Vict. c. 110. s. 13. And we give judgment for the plaintiff.

Judgment for the plaintiff.

1854.

WATTS and wife *against* PORTER.

THE following abstract of the pleadings and facts in this case is taken from the judgment of Lord Campbell C. J., before whom the cause was tried at the *Westminster* Sittings after last *Hilary* Term.

“The declaration alleged that the plaintiff *Elizabeth*, while sole, paid to defendant, as a solicitor, 3700*L.*, to be invested at interest, on good security; and that he, wrongfully, advanced the money to one *Theodore Williams* on bad security; whereby it became lost to the plaintiffs. Pleas: 1. Not guilty; 2. Denying the retainer. At the trial, it was proved that the money had been paid to the defendant, as a solicitor, in the manner alleged; and a clear case of negligence was made out against him. On the 10th of *January*, 1844, he advanced 2000*L.* of the money to the Rev. *Theodore Williams*, on an agreement bearing date that day, and signed by *Williams*, purporting to be between him and the plaintiff *Elizabeth* (then *Elizabeth Davis*), which, after reciting that *Joseph Williams*, by his will, having bequeathed certain annuities and made other pecuniary bequests, had devised and bequeathed all the residue of his estate, real and per-

A., an attorney, employed by *B.* to invest money, lent it to *C.* on an agreement, by which *C.*, as a security, charged his interest in 5000*L.* consols, standing in the names of trustees in trust for *C.* *A.* neglected to give notice to the trustees. A judgment creditor of *C.*, subsequently to this loan, obtained a charging order under stat. 1 & 2 *Vict.* c. 110. s. 14., notice of which was given to the trustees. *C.* obtained the benefit of the insolvent Act. *B.* brought an action against *A.* for negligence: on the trial, the Judge directed the jury, in esti-

imating the damages, to consider that, as no notice had been given to *C.*'s trustees of the charge in favour of *B.*, the subsequent charge created by the Judge's order had priority over it.

On a rule for a new trial:

Held by Lord Campbell C. J., *Wightman* J. and *Crompton* J. that the direction was correct, and that the judgment creditor had the same rights as a subsequent incumbrancer without notice, and was, therefore, to be preferred in equity to *A.*

Erle J. dissentiente, and holding that the judgment creditor had only those remedies which affected what, at the time of the charging order, remained the property of the judgment debtor.

1854. sonal, to trustees for the benefit of his brother, the Rev. *Theodore Williams*, and that, after his death, the trustees set apart the sum of 5000*l.*, which was standing in their names in the books of the Governor and Company of the Bank of *England*, to provide for the payment of the annuities, declared that the said sum of 5000*l.*, so standing in the name of the trustees, to which *Theodore Williams* would be entitled on the death of the annuitants, should be charged as a security for the said sum of 2000*l.* and interest. Subsequently, by an undated memorandum written on this agreement, which *Theodore Williams* signed, he further charged all his interest, under his brother's will as residuary legatee, with the further sum of 1700*l.* advanced to him on behalf of *Elizabeth Davis*. The defendant prepared the agreement and memorandum, but never gave any notice of the charge to the trustees, because, as he said, he considered it was only a temporary loan. On the 31st *May* 1847, *James Garden* and *Alexander Urquhart* recovered a judgment in the Court of Queen's Bench against *Theodore Williams*, for 8665*l.*; and, on the 27th *May* 1848, at their instance, an order was granted by my brother *Wightman*, under stat. 1 & 2 *Vict. c. 110. s. 14.*, charging the 5000*l.* standing in the names of the trustees with the judgment debt. This order was regularly entered on the books of the Bank of *England*, in which the stock stood; and express notice was given of the order to the trustees. The judgment remains wholly unsatisfied. And, in 1853, *Theodore Williams* was discharged by the Insolvent Debtors' Court, no part of the 3700*l.* having been repaid, no interest having been paid upon it for some years, and there being no dividend for his creditors. At the trial, the Judge directed the

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jury, in estimating the damages, to consider that, as no notice had been given to the trustees of the charge in favour of *Elizabeth Davis*, the charge created by the Judge's order in favour of the judgment creditors, of which notice had been given to the trustees, would have priority over it."

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In last *Easter Term* *Bramwell* obtained a rule Nisi for a new trial, on the ground of misdirection.

In the same *Term* (a), *Manisty* and *Hannen* shewed cause, and *Bramwell* and *Willes* were heard in support of the rule.

The arguments are so fully stated in the judgments as to render any further report unnecessary.

Cur. adv. vult.

There being a difference of opinion, the following judgments were, in this *Term* (*June 12th*), delivered seriatim.

Lord CAMPBELL C. J., after stating the pleadings, and the facts, as antè at p. 743, proceeded as follows.

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A rule was granted to shew cause why there should not be a new trial for misdirection on this point. But, after much deliberation, my brother *Wightman*, my brother *Crompton* and myself are of opinion that the rule should be discharged.

Our decision turns upon the construction of sect. 14 of stat. 1 & 2 *Vict. c. 110.*, by which it is enacted: "that if any person against whom any judgment shall have

(a) *May 10th*, before Lord Campbell C. J., *Wightman*, *Erle* and *Crompton* Js. The case was partly heard on *May 4th*, when it stood over, on the understanding that an arrangement might be made; but, this not having taken place, the argument recommenced entirely on *May 10th*.

1854. been entered up in any of Her Majesty's Superior

 WATTS Courts at *Westminster* shall have any government stock,"
 v. &c. "standing in his name in his own right, or in the
 PORTER. name of any person in trust for him, it shall be lawful
 for a Judge of one of the Superior Courts, on the appli-
 Lord cation of any judgment creditor, to order that such
Campbell C. J., stock," &c., "shall stand charged with the payment of the
Wightman J., amount for which judgment shall have been so recovered,
Crompton J. and interest thereon, and such order shall entitle the
 judgment creditor to all such remedies as he would have
 been entitled to if such charge had been made in his
 favour by the judgment debtor; provided that no pro-
 ceedings shall be taken to have the benefit of such
 charge until after the expiration of six calendar months
 from the date of such order." By the order the stock
 is to stand charged with the payment of the money
 recovered by the judgment; and it is to have the same
 effect as if such charge had been made, in favour of the
 judgment creditor, by the judgment debtor. If, at the
 time of the order, a charge had been given on the fund
 by the judgment debtor, in favour of the judgment
 creditor, the judgment creditor having no notice of any
 previous charge, and he had given notice of his charge
 to the trustees, independently of the statute, it would
 have had priority over the previous charge created in
 favour of *Elizabeth Davis*, of which no notice had been
 given to them. But, by the statute, the Judge's order is
 to be a charge upon the stock as if a charge had been
 given by an instrument which the debtor had himself
 signed; and the remedies upon it are the same.

A charge so given by the debtor to a creditor, without
 notice of any previous charge, if notice of it be served
 upon the trustees, would certainly be preferred to a

previous equitable charge of which the trustees had no notice. It is the notice, only, which establishes any privity between the trustees and the party in whose favour the charge is given: by such notice, only, is the security completed: when it is given, the trustees become trustees for the party in whose favour it is given: and, till this charge is satisfied, they can apply no part of the fund to satisfy the demand of a party who had obtained a prior equitable charge of which they had subsequent notice.

The defendant contends that the statutable proceeding, specified by sect. 14 of the Act, is of the same nature as an execution, allowing the debtor's equitable interest to be taken to satisfy the judgment; and that it can only be taken, subject to any prior equitable charge created, although that charge has not been perfected by notice to the trustees. But we think that this would be doing violence to the language of the Legislature, which puts the judgment creditor, who has obtained the charging order, in the same situation as if he had, at that moment, obtained an instrument, executed by the judgment debtor, creating the charge. Having given notice of it to the trustees, and having had no notice of the former charge, he would, under these circumstances, before the statute 1 & 2 *Vict. c. 110.* passed, have been preferred to the prior incumbrancer. This doctrine, which without any express decision upon the subject had long been recognised, was at last solemnly established in the two cases of *Dearle v. Hall* and *Loveridge v. Cooper (a)*, which came on together before Sir *Thomas Plumer*, Master of the Rolls.

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(a) 3 *Russ.* 1.

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is not taken, there is neglect ; and it is fit that it should be understood, that the solicitor, who conducts the business of the party advancing the money, is responsible for that neglect." "These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees ; and they must be considered as foreseen by those who, in transactions of that kind, omit to give notice ; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty : and whenever persons, treating for a chose in action, do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title ; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons." This decision was affirmed, upon appeal, by Lord Chancellor *Lyndhurst*, who entirely approved of the reasoning of the Master of the Rolls, and added (a): "In cases like the present, the act of giving the trustee notice, is, in a certain degree, taking possession of the fund : it is going as far towards equitable possession as it is possible to go ; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

Such being the rights of contending incumbrancers independently of stat. 1 & 2 *Vict. c. 110.*, when one of them is a judgment creditor, who has obtained a charging order under that statute, his rights must depend entirely on the construction of the statute ; and this construction must be the same in a court of law and in a court of equity. Every tribunal, administering justice

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(a) 3 *Russ.* 58.

1854. according to the statute, must consider only the effect intended by the Legislature to be given to the charging order; and this is to be learned from the language in which the meaning of the Legislature is expressed, without interpolating something not to be found. In the 14th section, it gives, in the most unequivocal terms, the same remedies to the judgment creditor, who has obtained the charging order, to which he would have been entitled "if such charge had been made in his favour by the judgment debtor." The defendant's counsel contended that we are bound to understand the word "honestly" to be implied, and that the charging order is only to have the effect which a charge of the debtor would have had, if made *honestly*. To interpolate the word *honestly* would, we think, be a qualification of the enactment wholly unauthorized. The words, that are to be understood as implied by the Legislature, we think, are "validly and effectually." The debtor could not *validly* and *effectually* make a charge, to have priority over an antecedent equitable charge to which the incumbrancer has completed his title: and therefore the charging order has no such operation: but, the first incumbrancer not having completed his title by notice to the trustees, the debtor might make a charge to a subsequent incumbrancer, which in point of law would be valid and effectual. At the time of this charging order, the stock still continued to stand in the name of the trustees, in trust for *Theodore Williams*; till notice from *Elizabeth Davis*, they were not trustees for her; and, immediately after notice of the charging order, they became trustees for the judgment creditor. At the expiration of six months, the judgment creditor might have proceeded against them in a court of equity. It is

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difficult to see how, after such a proceeding, *Elizabeth Davis* could have intervened, or made her claim available. It is not contended that the trustees can be liable both to her and the judgment creditor.

Our construction of the statute throws no hardship whatever upon the person who obtains the first equitable charge; for, if he uses due diligence and gives immediate notice to the trustees, his title is complete and absolutely secure; and he has nothing to apprehend from a charging order afterwards obtained by a judgment creditor, any more than from a subsequent equitable charge voluntarily created by the debtor: whereas the contrary construction seems to have a tendency to encourage laches on the part of the first incumbrancer, and, by keeping the trustees in ignorance of charges created on the fund, to enable the cestui que trust to commit frauds on subsequent incumbrances. The first incumbrancer may suffer (as *Elizabeth Davis* does) by the negligence of a solicitor in not giving notice to the trustees: but for this the law gives a remedy by action against the solicitor, in which damages are to be recovered commensurate to the loss sustained. The defendant's counsel mainly relied upon the great case of *Whitworth v. Gaugain* (a), which was decided by that very eminent Judge, Vice Chancellor *Wigram*, was affirmed on appeal by Lord Chancellor *Cottenham*, and was approved of by Lord *St. Leonards* when Lord Chancellor of *Ireland*. To the authority of that case we implicitly bow; and we entirely concur in the reasoning on which the decision proceeded. An equit-

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(a) 1 *Phillips's Ch. R.* 728, affirming the judgment of *Wigram V. C.* in *Whitworth v. Gaugain*, 3 *Hare*, 416. See *Whitworth v. Gaugain*, *Cr. & Ph.* 325.

1854. able mortgagee of lands, who has completed his equitable title, is to be preferred to a creditor of the mortgagor, who, without notice of the equitable mortgage, has, subsequently thereto, recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of elegit. There, certain bankers, in consideration of an existing debt, and of a farther advance of money to a customer, obtained from him a deposit of all the title deeds of certain freehold and copyhold lands of which he was seised, with a written memorandum, signed by him, regularly charging the lands with payment of the whole debt and interest. Other creditors subsequently recovered judgments against him, and, under sect. 13 of stat. 1 & 2 *Vict. c. 110.*, sued out elegits, under which the sheriff delivered to them the whole of the lands. The bankers having filed a bill in Chancery, praying that they might be declared to have an equitable mortgage upon the lands, and to be entitled to priority over the elegits and judgments, they prevailed. But why? Because they would have been preferred to the judgment creditors, if, at the time when the judgments were recovered, the person against whom the judgments were recovered "had by writing under his hand agreed to charge" the lands with the amount of the judgment debts. The elegits were allowed to have the same operation, and no more. But there was no laches on the part of the equitable mortgagees: and, before the judgments were recovered, their equitable title was perfect. *Wigram V. C.* considered that the memorandum, coupled with the debt and the deposit of the title deeds (*a*), "created as perfect an equitable charge as intention and act can possibly create;" that, from that

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(*a*) 3 *Hare*, 424.

time, the mortgagor became trustee for the mortgagees; and that, under an execution against him on judgments subsequently obtained, the judgment creditors could not take for their own benefit that which was in truth the property of the cestui que trusts. Lord *Cottenham*, in affirming the decree, observed that (a) "by the equitable mortgage the plaintiffs acquired a special lien upon the property;" and that they had as strong an interest as if a mortgage had been executed. Proceeding on the ground that the title of the equitable mortgagees was complete, he held that they must have been preferred to the judgment creditors, independently of the statute; and that, although under the statute the judgments operated as a charge upon all the lands, it must be taken as a charge subsequent to the charge before created by the equitable mortgage. Indeed such effect is given to a perfected equitable mortgage that, in *Casberd v. Attorney General* (b), it was allowed to prevail against an extent at the suit of the Crown. But, in the case at bar, on account of the gross negligence of the defendant, the equitable title of *Elizabeth Davis* had not been completed before the charging order, and notice of it to the trustees. She has an equity, as against *Theodore Williams*, the mortgagor; but, in competition with the judgment creditors, who have a charge upon the fund and have perfected their title to it, her's is not an equal equity: she had acquired no right, legal or equitable, in the property; and, there being no privity between her and the trustees, she could only proceed against *Theodore Williams*, her debtor, in personam.

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In our researches upon this important subject, we have found two recent cases which were not cited at the bar, but which are well entitled to our deliberate consideration before we pronounce judgment.

The first is *Brearclyff v. Dorrington* (a), before Vice Chancellor *Knight Bruce*. A testator left real and personal property to trustees, to be sold and divided among children. One of the children, by assignments for valuable consideration, created charges on his portion; and *notice of each of these assignments was, immediately after its execution, given to the trustees of the will.* A judgment was recovered against the assignor. A sale was ordered of the real estates; and the proceeds were vested in the three per cents.: the judgment creditor obtained a charging order, under stat. 1 & 2 *Vict. c. 110. s. 14.*, upon the share of the assignor. The question then arose, Which should be preferred, the assignees or the judgment creditor? The Vice Chancellor decided (we think most properly) in favour of the assignees. They had perfected their equitable security long before the charging order; and a new charge, then created by the debtor, could not have affected their securities. If the parties had equal equities, priority of date was to determine the preference between them.

The case came exactly within the principle of *Whitworth v. Gaugain* (b). But the Vice Chancellor is reported to have said *obiter* (c): "I doubt very much whether" the judgment creditor "is entitled to all the same rights as if he had been a purchaser by particular

(a) 4 *De G. & Sm.* 122. (b) 3 *Hare*, 416; 1 *Phillips's Ch. R.* 728.

(c) 4 *De Gex & Sm.* 123.

contract for value. He is not in this situation." He claims under stat. 1 & 2 *Vict. c. 110. s. 13.* "*I doubt whether this provision enables him to obtain more than his debtor had at the time fairly to dispose of.* I do not, however, think it necessary to decide the point." Unfortunately the very learned Judge does not at all state on what his doubts rested, or how he thought that this construction could be put upon the language of the statute.

A still later case is *Dunster v. Glengall (a)*, before the Master of the Rolls in *Ireland*. His Honor there decided that an equitable mortgagee, by deposit of railway shares, is entitled to priority over a prior judgment creditor, who, subsequently to the mortgage, has obtained an order charging the shares. We entirely concur in this decision; but we cannot concur in the reason given for it by the learned Judge. On 22d *May* 1848, *Dunster* recovered a judgment against Lord *Glengall*. In *Easter Term*, 1849, *Sargeant* recovered a judgment against him; and Lord *Glengall* deposited with *Sargeant*, by way of collateral security, the certificates of twenty shares which he held in the *Waterford and Limerick Railway Company*, and, at the same time, signed a memorandum by which he declared that the shares were deposited as an equitable mortgage, and that he charged the shares with the sum due on the judgment. On 2d *June* 1851, an order was granted, and served on the Railway Company, charging the shares with the sum due to *Dunster* on his judgment. It did not appear that *Sargeant* had given notice to the Company of his security. Nevertheless there seems no doubt that *Sargeant* was entitled to priority. No

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1854. notice to the Company was necessary to complete his security. Notice is only required when a charge is to be created by way of equitable mortgage on an equitable interest, and where there are trustees in whom the legal estate is vested. The shares belonged to Lord *Glengall*; and the Company were not bound to attend to any equitable assignment he might make of them, or any incumbrance he might create upon them. Here, as in *Whitworth v. Gaugain* (a), the equitable security of *Sargeant* was complete by the deposit and the memorandum. It could not have been prejudiced by a subsequent charge created by Lord *Glengall*, of which notice was given to the Company; and therefore it could not be prejudiced by the subsequent charging order. Nevertheless his Honor, the Master of the Rolls, is reported (b), in deciding in favor of *Sargeant*, to have considered the doubts of Lord Justice *Knight Bruce* as a deliberate opinion that the judgment creditor, who obtains a charging order, can obtain no more under it "than his debtor had at the time fairly to dispose of;" and to have rested his decree upon that opinion. After citing the passage from the judgment in *Brearcliff v. Dorrington* (c) above mentioned, his Honor proceeds as follows: "It appears to me that the opinion thus expressed by Sir *Knight Bruce* is correct, and that Lord *Glengall* having, by the letter of the 2d February 1851, granted an equitable charge on the shares, his judgment creditor did not obtain by the charging order more than Lord *Glengall* had at the time fairly to dispose of. I shall therefore affirm the Master's order."

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(a) 3 *Hare*, 416; 1 *Phillips's Ch. R.* 728. (b) 3 *Irish Chan. Rep.* 56.

(c) 4 *De Gex & Sm.* 122.

According to this doctrine, we ought to decide in the present case in favour of the defendant; for, when the judgment creditors obtained the charging order, *Theodore Williams* could only have fairly disposed of his interest in the stock standing in the names of the trustees, subject to the prior charge in favour of *Elizabeth Davis*, although he might have created effectually a valid charge in favour of a subsequent incumbrancer who gave notice to the trustees. But, with the most sincere respect for those with whom we differ, we are bound to say, for the reasons we have given, that this doctrine does not appear to us to carry into effect the expressed intention of the Legislature. It must be borne in mind that, when the remedy against the person of the debtor was greatly abridged, the object of stat. 1 & 2 Vict. c. 110. was, not only to make the judgment attach on property not before bound by it, but also, by means of an order to be obtained from the Court, or a judge, to give the creditor the advantage of an express charge, attended with peculiar incidents. Among these, is a delay of one year before the creditor can seek to obtain the benefit of a charge, created under sect. 13, and of six months before he can seek to obtain the benefit of a charge created under sect. 14. Therefore the authorities collected in 5 *Bacon's Abridgment*, p. 662. (a) *Mortgage* (E) 3., to which we were referred, and the rules respecting what may be taken in execution under a judgment, and the respective rights of judgment creditors without any specific charge, and others with a specific charge, on the property taken in execution, cannot govern us. It appears to us that the Legislature has placed the judgment creditor, who has obtained the charging order, exactly in the same situation as if the debtor had at that

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time signed an instrument, giving him a charge upon the fund: and, in the absence of any unfairness on the part of the judgment creditor, it is wholly immaterial to him whether the debtor, if he had created this charge, would have acted fairly or unfairly to other creditors. We have only further to remark that we put exactly the same construction on the 13th and on the 14th sections of stat. 1 & 2 *Vict. c. 110.*, which are both framed on the same principle, so as in extending the rights and remedies of judgment creditors to protect all prior interests and charges, which have not been left defective by the laches of those in whose favour they were created. For these reasons we think that, in this case, the damages, arising from the defendant's negligence, were properly estimated, upon the supposition that the plaintiffs could have no claim to the fund in question till the charge of the judgment creditors is satisfied: and that the verdict ought not to be disturbed.

Erle J.

ERLE J. Upon this rule, the question raised was, Whether the order of a Judge, charging stock, standing in the name of a trustee in trust for the judgment debtor, with a judgment debt, gave priority to the judgment creditor over a prior mortgagee of this stock; the mortgagee not having given notice to the trustee of his mortgage, and the judgment creditor not having notice of the mortgage, and the stock still remaining in the name of the trustee. The answer depends upon stat. 1 & 2 *Vict. c. 110. s. 14.*, giving to a judgment creditor with a charging order all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor.

For the affirmative, it was contended that, if the

creditor had received a charge from the debtor, and had given notice of it to the trustee, without having notice of the mortgage, he would have had priority over the mortgagee; and that the giving of such notice was a remedy he would have been entitled to: therefore a judgment creditor, with a charging order, is said to be entitled to the same remedy.

For the negative, it was contended that the remedies intended by the statute were remedies, against the debtor, which would make *his interest* in the stock available for payment of the debt, and which would arise upon a lawful charge, made by him in favour of the creditor.

The debtor's interest only is charged; for the condition in the statute for the charge is, that there should be stock standing in the name of a trustee, in trust for the debtor; now, if the debtor has already assigned the stock, without notice to the trustee, it is not standing in trust for him, but in trust for the assignee, at least as between these parties. The assignee could at any time compel the trustee to transfer the stock to him: and neither the debtor nor the trustee could resist the claim of such assignee on the ground that he had given no notice to the trustee: and what is true of an assignment of the whole stock is true of a partial charge thereon. It is admitted that this would be the effect of the charging order upon stock standing in the debtor's name, and equitably mortgaged by him before the charging order. The equitable mortgagee would have priority; for the debtor would be trustee of the stock for him, and the stock would not be standing in his name on his own behalf. It is not probable that the Legislature intended to give a greater effect to the

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order upon stock standing in the name of a trustee than it would have upon stock standing in the debtor's name.

Also the charge, intended by the statute, must be taken to be a lawful charge; for it is not to be supposed that the Legislature intended to force the debtor into the situation of a breaker of the law. Now, if the debtor made a lawful charge on stock, he would either specify his interest therein or charge it subject to outstanding incumbrances. The compulsory charge by a judgment creditor is analogous to a charge expressed to be on such interest as the debtor might have; and, if worded in that way, the charge would give no right, beyond what the debtor had, as a charge so worded seems to be notice, to the creditor taking it, to inquire. The second charge would not take priority over the first, unless the debtor charged, as unincumbered, that which was incumbered; if he did so, he would clearly violate the law, so far as to be liable to an action of tort for the damage arising from the false representation. If he asserted expressly that it was unincumbered, and obtained the advance by that falsehood, he would be indictable for a false pretence. The judgment creditor therefore would not be entitled to priority over the first mortgagee if the charge intended in sect. 14 is a lawful charge.

Furthermore, the claim to take the stock from the first mortgagee is, not a remedy against the debtor, for he has lost the stock in any event, but a remedy against the first mortgagee, a remedy given upon the general principle for deciding which of two innocent claimants shall suffer by the fraud of a third party, namely he who facilitated the fraud. Such is the doctrine of

Loveridge v. Cooper (a). Now a judgment creditor is in no analogy with a second mortgagee who has been deceived into taking, as unincumbered, a security that was incumbered. The judgment creditor has trusted to no particular security: he has rights, which may be made to charge all the available assets of the debtor, and, among the rest, his stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof: and the judgment debtor, by suffering judgment, has not used deception, nor been guilty of any fraud. The reason therefore, for giving priority to a second mortgagee over the first, wholly fails in respect of a judgment creditor.

The previous sections making other assets available for execution, and creating a charge thereon, by registering the judgment, are in *pari materiâ*, and closely analogous to the section in question; no reason can be assigned why a charge, created on stock by sect. 14, should be a charge to a greater extent, or entitling to any other right under the name of remedy, than the charge on interests in land created by sect. 13. By sect. 13 the registered judgment is to entitle to the same remedies as if the debtor, having power to charge, had agreed to charge. There the charge is confined to the power which the debtor had, and does not extend to the possibility of interest which a fraudulent mortgagor may give rise to by granting a second mortgage without notice of the first, in which case no interest passes from the mortgagor. The authorities support this view. In *Brearcliff v. Dorrington* (b) Vice Chancellor *Knight Bruce* expresses an opinion that sect. 13 enables the debtor to charge so much, only, as he could fairly dispose

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(a) 3 *Russ.* 1. 30.(b) 4 *De G. & Sm.* 122.

1854. of. *Dunster v. Glengall* (a) is a decision accordingly
 WATTS by the Master of the Rolls in *Ireland*. In *Johnson*
 v. *Holdsworth* (b) Vice Chancellor Lord *Cranworth*,
 PORTER. speaking of sect. 13, says, as well since stat. 1 & 2 *Vict.*
Erle J. c. 110. as before, a judgment is an equitable lien on what
 could be taken by elegit; and assets equitably mortgaged
 could not be taken by elegit. In *Hawkins v. Gather-*
cole (c) the intention of the Legislature, in 1 & 2 *Vict.*
 c. 110., is said to have been, to create a charge in all
 property which by any process of execution could be
 made available for the judgment creditor; which
 indicates the same limit. In *Whitworth v. Gaugain* (d)
 the judgment creditor is held not to have the right of a
 purchaser for value without notice as against a former
 equitable mortgagee. In *Fury v. Smith* (e), cited in
Sugden On Vendors and Purchasers, 3d vol. p. 362.
 (10th ed.) (g), it was held that the judgment creditor
 could not take a term, by elegit, against a prior mort-
 gage thereof, by an unregistered deed, in a registered
 county. In *Langton v. Horton* (h) the distinction is
 taken that an equity, imperfect as between two mort-
 gagees, may be perfect as between mortgagor and
 mortgagee; and, if the judgment creditor has the
 rights of the judgment debtor, an equity perfect
 against the debtor is perfect against the judgment
 creditor. Upon this review, the arguments for the
 negative appear to me to preponderate. And, upon the
 words of the statute, the authorities, and the reason for

(a) 3 *Irish Chan. Rep.* 47.(b) 1 *Sim. N. S.* 106.(c) 1 *Sim. N. S.* 63, 74.(d) 1 *Phillips's Ch. R.* 728; 3 *Hare*, 416.(e) 1 *Hud. & Bro. Irish Reports*, 735.

(g) P. 978, 11th ed.

(h) 1 *Hare*, 549.

the law, I am of opinion, that a judgment creditor with a charging order on stock does not become entitled to it, against a prior mortgagee, although he has given no notice of his mortgage to the trustee of the stock. If that be so, the direction was wrong, and the rule for a new trial should be absolute.

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Erle J.

Rule discharged.

The QUEEN *against* SAUNDERS.

Wednesday,
May 31st.

SIR F. Thesiger, in last Term, obtained a rule calling on the prosecutors to shew cause why the orders or resolutions made by the justices of the County Palatine of Lancaster, at the Court of annual Session of the peace on 30th June 1853, whereby it was resolved "that the sum of 53*l.* 7*s.* 6*d.*, part of an order of two magistrates, paid by the county treasurer, be allowed him in his accounts," should not be quashed.

The justices of the county of L. made rules for regulating the payment of expences attending the gaol, by which the gaoler's expences were to be certified by two visiting justices, and then paid by the county treasurer.

It was the custom to allow refreshments at the Sessions, and other meetings on county business, held at the Court House in the gaol, and to charge them as part of the expences of the gaol. A public inquiry, not connected with county business, was held at the Court House. Refreshments were furnished to those who attended, including some of the magistrates and their friends who took no part in the inquiry; the two visiting justices directed them to be paid for by the treasurer; which was done. At the ensuing annual Sessions in September, this payment was disallowed in the treasurer's accounts; and the accounts, so altered, were transmitted to the Home Office, under stat. 15 & 16 *Vict. c.* 81. *s.* 50. Subsequently, at an adjourned annual Sessions in the ensuing year, this disallowance was rescinded, and the payment allowed. There was a standing order at Sessions that notice should be given before any motion was made for altering or rescinding any resolution of the Court; but no notice had been given on this occasion.

The orders of Sessions having been brought up by certiorari, and a rule granted to quash so much as allowed this payment:

Held: that the Sessions had no power to allow a sum already disallowed at a former Sessions: that the payment of the expences of what was not connected with county business was illegal; and that the former Sessions were bound to disallow it: and that the direction of the visiting justices was not a judicial order which the treasurer was bound to obey. And the rule was made absolute to quash so much of the order as was complained of.

Held, also, that it was not necessary to include the direction of the visiting justices in the return to the certiorari.

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The order had been brought up by certiorari, on the affidavit of *W. A. F. Saunders Esq.*, a justice of the County Palatine, from which the following facts appeared.

In *November 1851*, an inquiry was instituted by the Earl of *Carlisle*, then Chancellor of the Duchy of *Lancaster*, into the conduct of *William Ramshay Esq.*, judge of the county court of *Lancashire* holden at *Liverpool* (a). The inquiry was conducted at *Preston* in *Lancashire*. The visiting justices of the House of Correction at *Preston* made an order, granting the use of the Sessions Court House at *Preston* for the purposes of the inquiry. By the proceedings great numbers of persons were attracted to the Court, including several justices of the county, their families and friends. The inquiry continued several days: and, at the instance of some of the justices who attended the Court, wine and other refreshments were supplied to them and their families, and other persons present. The amount, which was *53*l.* 7*s.* 6*d.**, was paid by the county treasurer out of the county rates, under an order of two visiting justices of the House of Correction at *Preston*: and this formed part of an item of *287*l.* 2*s.* 3*d.**, which was charged by the treasurer, in the *Preston* House of Correction accounts, as "Sessions Expences." At a general session holden by adjournment at *Preston* on 9th *September 1852*, the treasurer's account being laid before the justices, it was resolved: "That the sum of *53*l.* 7*s.* 6*d.**, part of the sum of *287*l.* 2*s.* 3*d.**, charged as Sessions Expences in the *Preston* House of Correction accounts, be disallowed;" and "That, subject to the disallowance of the said sum of *53*l.* 7*s.* 6*d.**,

(a) Stat. 9 & 10 *Vict.* c. 95. s. 18. See *Ex parte Ramshay, Hilary Vacation, 1852.*

the said accounts be, and they are hereby, allowed accordingly."

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The sum so disallowed was the sum paid by the treasurer for refreshments. An abstract of the county accounts, so allowed with the said exception, was afterwards transmitted by the clerk of the peace to the Secretary of State for the Home Department; and a copy laid by him before Parliament (a). The affidavit set forth motions made, after due notice given, at successive adjourned annual general meetings of the Sessions, down to and including a session holden on 6th *April* 1853, for rescinding the disallowance of the 53*l.* 7*s.* 6*d.*; none of which was successful. By a standing order adopted at an adjourned annual Session holden on 10th *April* 1850, it was provided: "That no proceedings or resolution of the Court shall be altered or rescinded, otherwise than by a motion, of which previous notice shall be given and inserted in the summons sent to each justice of the county." In the summons sent for the annual Sessions holden on 30th *June* 1853, the following notice of motion appeared: "That the county treasurer be instructed to apply, through the deputy clerk of the peace's office, to the Court of Queen's Bench, for a mandamus against this Court, to shew cause why it has refused to pass his accounts for the year ending *May* 1852, he having paid them according to the orders of this Court, the same having been audited and found correct by the auditor and general finance committee." The motion was put and seconded; but an amendment was put, and seconded,

(a) Sect. 15 & 16 *Vict. c. 81. s. 50.*

1854. "That the sum of 53*l.* 7*s.* 6*d.*, part of an order of two magistrates paid by the county treasurer, be allowed him in his accounts." This amendment was opposed by Mr. *Saunders*, but was carried by a majority of the magistrates present; and a resolution in those terms was entered in the book of the Sessions. At the adjourned annual session holden on 8th *December* 1853, Mr. *Saunders*, in pursuance of notice previously given, moved that the amendment was in violation of the standing order, and that the resolution entered was void. The motion was seconded; but the chairman refused to put it. Mr. *Saunders* further deposed that he had always opposed the allowance of the 53*l.* 7*s.* 6*d.*

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The return to the certiorari included the order of 30th *June* 1853, the accounts of the county treasurer as far as related to the Houses of Correction at *Preston* and *Kirkdale*, and the proceedings at the Sessions holden on 9th *September* 1852. The order of the visiting justices, of 28th *September* 1851, after mentioned, was not returned.

C. M. Wilson, the county treasurer, made affidavit in opposition: in which he deposed that there was no House of Correction for *Lancashire* maintained out of the county rate, and that the Houses of Correction at *Preston* and *Kirkdale* were maintained out of a distinct rate, levied, not on the county at large, but on five hundreds thereof, *Lonsdale*, *Amounderness*, *Blackburn*, *Leyland* and *West Derby*, and were used as such Houses of Correction for those five hundreds only. That the rates for maintaining the House of Correction at *Preston* had, by ancient usage, been assessed by the justices, in quarter sessions, until the establishment of a general

annual session in 1798 (a), and, since then, by such annual session. That, until 1845, these rates were payable to the treasurer of the House of Correction at *Preston*, who was distinct from the treasurer of the county. That, at the annual *January* session, held by adjournment on 22d *May* 1845, it was resolved by the justices that, on and after 24th *June* then next, the duties, offices, authorities and functions of all treasurers in the county, except the treasurer for the lunatic asylums, be transferred to, vested in, and executed by, the county treasurer. And that, after the day last mentioned, the rates for the maintenance of the House of Correction at *Preston* were made payable to the county treasurer. That separate accounts were kept of them, distinct from those of the general county rates. "That, for a long series of years, the Quarter and General Sessions of the Peace for the county of *Lancaster* have been held, originally or by adjournment, at the Court House in *Preston*, within and forming part of the House of Correction there ; and the business arising within the several hundreds of *Amounderness*, *Blackburn* and *Leyland* has usually been transacted at the said Sessions holden at *Preston* ; and the expences attending the holding of such Sessions have been charged as part of the expences of maintaining the said House of Correction." That, for a series of years last, the business at *Preston* sessions has been heavy ; and that the Court of Sessions, in order to expedite the business, generally sits until a late hour of the day. That, in order to do this, it is found necessary to allow the justices, jurors and witnesses a short time in the middle of the day to take refreshment ;

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(a) Stat. 38 G. 3. c. lviii., local and personal, public. See sect. 2, &c.

1854. and that, in order to save all unnecessary delay, it has

The QUEEN been long found more expedient and economical to
v. provide such refreshments for the justices and jurors in
SAUNDERS. or close to the court house than to leave them to seek it
for themselves in the town at a distance; the cost
whereof has been charged under head of Sessions Ex-
pences, and has been included in the charge of main-
taining the said House of Correction." "That it has
been long customary, at meetings of the justices on
magisterial business in the said Court, whenever the
said meetings lasted beyond the middle of the day, to
provide refreshment as lunch for the justices attending
the meetings." That on 7th *July*, 1851, certain rules
were settled by the visiting justices of prisons, in
conjunction with the general finance committee and the
treasurer of the county, to regulate the payment of
moneys by the treasurer for the services of the gaols and
houses of correction at *Preston* and other places, in
accordance with a resolution of the Court of annual
session holden on 27th *June* 1850.

The affidavit set out these rules, of which the 3d and
6th were as follows:

"3. That estimates of the pay required for the ser-
vants of the gaols and houses of correction, and for
contingencies, be prepared monthly by the governors,
signed by them, certified by two visiting justices, or the
chairman of their committee, and then transmitted by
the governors to the treasurer of the county. The
governors to obtain weekly orders, signed by two visiting
justices, for the amounts (the last to include extra days),
on the county treasurer, who shall make arrangements
that the same be paid by the county bankers or their
agents when presented."

"6. Bills for all articles and provisions furnished to the gaols or houses of correction, and for repairs, alterations and contracts, to be discharged within each quarter: the quarters for this purpose to terminate on the 24th day of *August*, the 24th day of *November*, the 24th day of *February*, and the 24th day of *May*. Separate orders for each tradesman or contractor upon the county treasurer being obtained by the governors, and handed over to the proper parties, the same to be paid by the bankers in like manner as the orders for salaries" &c.

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To carry out these rules, a form of order was adopted by the visiting justices, and agreed to be used by them when drawing upon the treasurer. The affidavit set out the form in blank. The order of 28th *November* 1851, hereafter set out, followed this form (a).

In 1851, the Chancellor of the Duchy of *Lancaster*, for the purpose of the inquiry before mentioned, applied to the visiting justices of the House of Correction at *Preston* for the use of the Court House. The said justices, at a meeting holden on 1st *November* 1851, came to the following resolution: "That the use of the Court House be granted to the Chancellor of the Duchy, on the 5th instant and following days; and that the governor be directed to make all necessary arrangements."

The treasurer deposed that "such resolution, as this deponent is now informed and verily believes, was intended and understood by the officers of the said House of Correction as a direction to them to make the like provision as was usual at sessions; and, accordingly, refreshment was provided for the Chancellor, his as-

(a) See note (u) p. 770.

1854. sessor and secretary, the bar, including the county court
 The QUEEN judge concerned in the inquiry and his counsel, and for
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 the officers of the said House of Correction. That the
 expence of such refreshments, as this deponent is in-
 formed, but of which at the time he had no knowledge,
 was included in the charge of those provided at sessions;
 and, at the end of the quarter terminating in *November*,
 an order was made out and signed by two visiting jus-
 tices, to wit *John Bairstow* and *Richard Newsham*, in the
 usual form, and according to the rules, in manner and
 terms following; that is to say:

‘ *Preston Gaol.*

‘ County Palatine }
 (L. s.) } No. [27].
 of *Lancaster.*

‘ To the treasurer of the County.

‘ You are hereby required to pay to Mr. [*Richard Brown*], of [*Preston*], the sum of [80*l.* 19*s.* 0*d.*], for [magistrates’ luncheons supplied] this establishment, and class the expenditure under the head of [Sessions Ex-
 pences].

‘ Dated this [28th] day of [*November*] 18[51].

‘ £ [80. 19*s.* 0*d.*]

[*John Bairstow*
Richard Newsham] } Visiting Justices.

‘ Countersigned [*Richard Brown*].

‘ N. B. The above order will be paid by *The Lancaster Banking Company* if presented (countersigned by the party in whose favour it is made) on or before the [29th] instant” (a).

(a) This was in the form mentioned, ante, p. 769. The parts above printed between brackets were inserted in the blanks in the form.

The order for 80*l.* 19*s.* was handed to *Brown*, and by him presented to *The Lancaster Banking Company* and paid by them, without the personal knowledge or interference of the treasurer. The payment was not charged against the county rate, nor otherwise than in the treasurer's account presented, at the annual session holden 1st *July* 1852, wherein, under the head of "Houses of Correction at *Preston* and *Kirkdale*," was the item "Sessions Expences, 287*l.* 2*s.* 3*d.*," which included the charge contained in the order of the visiting justices; and the treasurer credited himself with the item as a charge to be paid out of the rate levied upon the five hundreds. Neither the treasurer nor the bankers had any means of knowing how much of the amount mentioned in the order was for expences connected with the Chancellor's Court or the inquiry. But, when the accounts came to be considered at an adjourned annual session, held on 9th of *September* 1852, a debate took place, and inquiry was made how much of the charge arose from the sitting of the Chancellor at *Preston*: and, the governor of the prison having stated that 53*l.* 7*s.* 6*d.* was the amount so arising, that sum was disallowed. Up to this time, the treasurer was in utter ignorance of such item having been included in the said order for 80*l.* 19*s.*

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Joseph Kay now shewed cause. The order of 30th *June* 1853 cannot be quashed on certiorari. In the first place there is no defect on the face of the order, nor on the face of the account to which it refers. The affidavit upon which the certiorari was obtained shews, indeed, that the sum of 287*l.* 2*s.* 3*d.*, allowed in the account as "Sessions Expences," includes the sum of 53*l.* 7*s.* 6*d.*, expended upon refreshments. As a distinct

1854. head of county expenditure, the justices had perhaps no power to allow the last sum: but they had power to review the item of "Sessions Expences;" and it is not competent for this Court to investigate the account, and inquire whether, or in what way, the sum of 287*l.* 2*s.* 3*d.* is excessive. The order of the visiting justices is not brought up; and, being an order within stat. 13 *G.* 2. c. 18. *s.* 5., and more than six months having elapsed, it could not be brought up. [Lord *Campbell* C. J. The argument against you is that the two justices had no more power to include the 53*l.* 7*s.* 6*d.* in the Sessions expences than they had to include the expences of a ball or a bull-baiting. *Crompton* J. A void order is made by the justices, and acted upon by the treasurer: the objection is to this being allowed in the county accounts: why need the void order be brought up?] Without that, the Court has no means of seeing any want of jurisdiction on the part of the Sessions. Mr. *Saunders*, the applicant, is himself one of the body who has consented to the authority of the two justices to investigate the account. [*Crompton* J. That argument, if valid, would apply equally if the original order of allowance had been brought up.] The original order is not void: it is simply erroneous by reason of excess. In fact it appears from the treasurer's affidavit that, when the bankers paid the 80*l.* 19*s.*, he did not know, and had no means of knowing, that it included a charge for refreshments. By stat. 12 *G.* 2. c. 29. *s.* 7. the treasurer is to lay his accounts before the justices in Sessions: and, by sect. 9, the orders of the justices, "made at their respective general or quarter Sessions to such treasurer or treasurers, shall be deemed and allowed as good and sufficient releases, acquittances, or discharges, in any Court of law

or equity, to all intents and purposes whatsoever." The several divisions of the county, as appears by the affidavit in answer, have adopted the rules under which these accounts have been investigated: the payment is in effect the act of the Sessions, not of the treasurer. If they had, under these circumstances, no power to reopen the accounts after the payment, all done after the payment is a nullity; and the question must turn on the original order of allowance. That is not before the Court: and, if it were, this Court could not enter into the question how items, good on the face of the accounts, are in fact made up.

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Sir *F. Thesiger* and *Cowling*, contra (a). It seems scarcely disputed that this sum of 53*l.* 7*s.* 6*d.* was expended on purposes in no way connected with county matters, and ought not be paid out of the public stock of the county: but it is, in substance, contended that, though the payment was unjustifiable, this is not the proper way to remedy the misapplication. No suggestion is made as to what other course is to be pursued; and it appears that the present course is right. By stat. 12 *G.* 2. c. 29. s. 6. the treasurer of the county is to pay the money in his hands "as the said justices at their respective general or quarter sessions, or the greater part of them then and there assembled, shall by their orders from time to time direct and appoint, for the uses and purposes of the said recited Acts, and for any other uses and purposes to

(a) The argument in support of the rule was heard, and the judgments delivered, on 3d June: the Judges who sat on May 31st were Lord Campbell C. J., *Erle* and *Crompton* Js.; on June 3d *Erle* and *Crompton* Js. only, Lord Campbell C. J. being on that day in the Court of Criminal Appeal.

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which the public stock of any county," &c., "is or shall be applicable by law." So that the orders must be made in general or quarter sessions, and must be for legal purposes. What is called the order of the two visiting justices was neither one nor the other. It was by two justices, and was for "magistrates' luncheons." [Erle J. Do you wish to call in question the legality of allowing out of the county rate such refreshments as are fairly incident to the transaction of county business, or the validity of the system by which in this large county the Sessions delegate to a small number of visiting justices the superintendence of the gaol accounts? Both are so evidently practically beneficial that I should think your clients would not wish to disturb the practice.] Certainly not: the expences of refreshments incident to county business are not objectionable; but they must not be made the means of covering objectionable expences. The system by which the visiting justices are appointed is legal as well as convenient; but it has been misunderstood, and not rightly acted upon. The orders which are to justify the treasurer must be made by the Sessions (a). If the Sessions themselves make an order for an illegal purpose, it is no justification to the treasurer; *Rex v. Williams* (b): but in the present case the first order, made by the Sessions, was on 9th September, 1852, when an order was made, and properly made, disallowing this expence; the accounts were then audited, and transmitted to the Home Office, under stat. 15 & 16 Vict. c. 81. s. 50. After that, the Sessions had no further jurisdiction: and the order now complained of, made

(a) See stat. 15 & 16 Vict. c. 81. s. 48.

(b) 3 B. & Ald. 215.

on 30th *June*, 1853, was wholly without jurisdiction, even if due notice had been given of the motion. It is argued, however, that the payment took place under the order of the two visiting justices made on 28th *November*, 1851, and that such order should have been brought up on the certiorari within six months, according to stat. 13 *G. 2. c. 18. s. 5.* But the Sessions had no authority to delegate their power to any two justices; nor did they profess to do so. The treasurer is responsible for the money in his hands; if he pays it for a proper purpose, he is nearly sure that the justices at sessions will allow his accounts; but he is bound to see at his peril that the purposes are proper. Then the Sessions here directed that two of their body should superintend the gaol, and from time to time certify that the expences are proper. Their certificates are not orders, which the treasurer is bound to obey, but vouchers, which, when produced at the audit of his accounts, will satisfy the Sessions: and this scheme is both legal and convenient. But a mistake has been made in carrying out the system; for the form adopted, instead of being, as it ought to have been, a certificate to the treasurer, on which he was, subject to his legal responsibility, to pay, is in the nature of a cheque upon the bankers, to be paid out of the county fund. That is both illegal and improper; and, but for that, the difficulty would not have arisen. Had the visiting justices sent a certificate that these expences were incurred as incidental to the inquiry into the conduct of the county court judge, the treasurer would at once have seen that the visiting justices were exceeding the authority delegated to them, which was only as to the House of Correction. But, even if the Sessions themselves had

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1854. made an order to pay such expences, the treasurer was
The QUEEN bound to disobey it; *Rex v. Williams* (a).
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ERLE J. The rule must be absolute to quash so much of the orders of Sessions as is complained of.

I will first suppose that a direct application had been made to the Sessions, asking them to order the payment of these expences, and that the Sessions had made an order on the treasurer to pay them. Now, as I understand *Rex v. Williams* (a), an order to pay money for matters not connected with the county is one which, when the want of connection is apparent on the face of the order, ought not to be obeyed by the treasurer; and the payment ought not, if made, to be allowed. In the present case it is not argued that these expences are such as ought to be paid out of the county rate; but reliance is placed on the order of the two visiting justices, which, it is said, was a judicial order, binding on the treasurer, and on the Sessions. It appears that in this county an arrangement has been made, by the Sessions, for regulating the payment of moneys by the treasurer for the service of the gaols; under which the expences of the gaols are to be, from time to time, certified by two visiting justices, and then to be paid by the treasurer. Now, even if the effect of this arrangement was to give to the two visiting justices all the power to decide on the allowance of expences, which the Sessions themselves had, and assuming that such a delegation was legal, it is still manifest that the Sessions could not give the visiting justices a greater power than they could have themselves exercised, if they had themselves made an order, as was

(a) 3 B. & Ald. 215.

supposed by me in the beginning of my judgment. I think, however, that it was not intended to invest the two visiting justices with authority to allow any items. They were deputed, in a manner, to advise the treasurer as to what payments he should make; and in all probability payments which they directed would be sanctioned by the Sessions. But, if they should direct an illegal payment, and that fact is brought to the notice of the Sessions when auditing the accounts, the Sessions are bound, notwithstanding the direction of the visiting justices, to disallow the payment. I have hitherto proceeded on the supposition that the Sessions had allowed this payment. But, in fact, they disallowed it; and the year's account, with this item disallowed, became as it were a record under stat. 15 & 16 *Vict. c. 81. s. 50.*; so that it is difficult to see how any subsequent Sessions could open up what had become *res judicata*. Still more difficult is it, in my mind, to see how that could be done by a Sessions which took upon itself to dispense with that very salutary standing order requiring notice to be given. That, if there were no other objection to this order, would make it at least doubtful whether the order should not be quashed; because the Sessions were not properly constituted to entertain the question.

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CROMPTON J. I agree that the order must be quashed for two reasons.

First: I think that the Sessions, in 1853, had no power to interfere with what the former Sessions, in 1852, had done by disallowing (and in this case, as it happens, properly disallowing) a payment. It would be a very dangerous practice if such a thing were suffered. Items which ought to have been borne by

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the rate-payers in one year might be thrown on the rate-payers in another. That is a sufficient ground for making this rule absolute. But I should have come to the same conclusion if the first Sessions, when passing the treasurer's accounts, had allowed, instead of disallowing, this item. Passing accounts is a judicial act; those who do so ought to examine, and allow or disallow according to law: and, this being a judicial act, and the certiorari not being taken away, we are bound, if it appears that an illegal item has been passed, to grant a certiorari and to quash the illegal allowance. It is said that the order of the two visiting justices ought to have been brought up by certiorari. I am unable to see any ground for that. The order of the two visiting justices could not take away the discretion of those who are to pass the treasurer's accounts; and the rate-payers therefore were not affected by it. The grievance to the rate-payers was not the making of that order by the visiting justices, but the order of Sessions by which the sum passed into the accounts, and so became one of the items which the county is rated to pay. But, in effect, that which is called an order of the two justices was not an order on the treasurer, but a voucher to him.

I am therefore of opinion that the rule should be absolute; because the Sessions had no power to interfere with the disallowance by the former Sessions, and because that disallowance by the former Sessions was right.

Rule absolute.

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The QUEEN *against* ABNEY and another.*Wednesday,*
May 31st.

C. *G. MEREWETHER*, in *Easter Term*, 1853, obtained a rule calling on *William Wootton Abney* and The Reverend *John Manuel Echalaz*, two justices of *Leicestershire*, and on *William Stinson*, to shew cause why the said two justices should not issue a warrant for distress and sale of the goods and chattels of the said *W. Stinson* to levy the sum of 14*s.* 9½*d.*, assessed upon him by a church-rate granted for the parish of *Whitwick* in the said county, on 17th *December* last, and the sum of 10*s.* for costs, adjudged by an order of the said two justices, made 12th *March* last, to be paid by the said *W. Stinson* to *William Bonnett* as one of the churchwardens of the said parish.

The rule having come on for argument, it was ordered, by consent, that the rule should be enlarged, and that, in the mean time, a special case should be stated for the opinion of this Court, as to the validity of the rate, upon objections taken before the said justices: the churchwardens of the said parish, and the said *William Stinson*, to be the parties to the case.

The case was, in substance, as follows.

Upon 17th *December* 1852, a vestry meeting for the parish of *Whitwick* was held in the accustomed place, in pursuance of the following notice.

“This is to give notice: that a vestry meeting of the ratepayers of the three townships of the parish of *Whitwick* will be held at the Infant School Room on

Quære, Whether, under stats. 58 G. 3. c. 45., 59 G. 3. c. 134., a rate can be laid for the purpose of providing additional burying ground?

If it can, still a single rate, laid for purposes authorized by these Acts, and also for purposes for which a church-rate can be laid only at common law, is bad.

Therefore, where a rate was laid, with the formalities requisite for a rate under the statutes, “for and towards providing necessary additional burial ground” for a parish, “and for and towards spouting” a chapel, and the magistrates refused to issue a distress warrant for non-payment, this Court refused to order the magistrates to issue the warrant.

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Friday the 17th day of *December* instant, at 2 o'clock in the afternoon, to determine the best mode of providing additional burial ground for the said parish, and to make a church-rate for that purpose; and also for the draining of *Saint George's* Chapel Yard, and for spouting *Saint George's* Chapel, *Whitwick*. *December* 11th, 1852.

"Signed, *William Bonnett*, Churchwarden.

Francis Merewether, Vicar."

The above notice was published, as directed by the Act, upon the door of the parish church, but was so for one *Sunday* only.

At this meeting, a rate was granted by a majority of the rated inhabitants present.

The rate so made was laid as follows. "We, the churchwardens and other parishioners of the parish of *Whitwick*, in the county of *Leicester*, whose names are hereafter subscribed, in pursuance of a resolution passed at the vestry meeting duly holden the 17th day of *December*, 1852, for granting a rate of 4½*d.* in the pound for and towards providing necessary additional burial ground for the said parish, and for and towards the draining of *Saint George's* Chapel Yard, and for and towards spouting *Saint George's* Chapel in the said parish, rate and tax all and every the inhabitants and parishioners, and other ratepayers of the parish aforesaid, hereunder mentioned, to the said rate in the sums hereafter mentioned. Signed" by one churchwarden, the vicar (who was chairman), a curate, two overseers, and another.

The rate was duly allowed, and was, during the month of *February*, demanded of *William Stinson*; and, in consequence of his refusal, a summons was applied for and obtained, which came on for hearing before two justices at *Ashby de la Zouch*, *March* 12th, 1853.

Stinson, with his attorney, attended.

The magistrates decided against *Stinson*, and ordered him to pay the rate. They, however, declined to issue a distress warrant: and the above rule was therefore obtained in this Court; when the Court ordered this case to be stated, to try the validity of the rate.

The two Church Building Acts referred to are 58 *G. 3. c. 45. ss. 59., 60., 59 G. 3. c. 134. s. 24.*

The question for the opinion of the Court is, Whether the rate is good as against the objections stated above (a). If the Court shall be of opinion in the affirmative, then it is agreed that the rule shall be made absolute, the rate paid, and all proceedings stayed. But, if the Court shall be of opinion in the negative, then it is agreed that the rule shall be discharged.

C. G. Merewether, in support of the application. Three objections are made to the rate: first, that, under stats. 58 *G. 3. c. 45., 59 G. 3. c. 134.*, there is no power to lay a rate for the purpose of enlarging the burial ground; secondly, that, if there be such power, notice should have been given on two *Sundays*. Thirdly, that a rate for such purpose, if authorized by statute, cannot be joined with a church-rate. (The Court having pronounced no opinion on the first (b) and second (c) objections, the argument as to them is omitted.) As to the third objection, if the vestry have power to lay a rate for each purpose, why should they not lay it for the two jointly? Sect. 25 of stat. 59 *G. 3. c. 134.*, under which, if at all, the rate for enlarging

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(a) The case contained no statement of objections except as in the text.

(b) As to this, reference was made to stat. 58 *G. 3. c. 45. ss. 59., 60., 61.* and stat. 59 *G. 3. c. 134. ss. 24., 25.*

(c) Reference was made to stat. 59 *G. 3. c. 134. s. 25.*

1854. the burial ground is to be levied, enacts that “every such rate shall be made, raised, levied, collected, received and accounted for in like manner, and with all such powers, authorities, provisoes and regulations, and under and subject to such penalties and forfeitures, as are in law applicable to the making, raising, levying and collecting any church-rate in any parish.”

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Bovill, contra. (The argument as to the first and second objection is omitted.) *Regina v. Byrom* (a) is a decisive authority in favour of the third objection. [Lord Campbell C. J. The objection, which there appeared on the face of the rate, was not like this.]

C. G. Merewether, in reply. If there be any deficiency, for the supply of which a rate may be made, that authorizes a general rate. [*Crompton* J. The determination, as to different items, might be different: and the preliminary steps vary, in time and other particulars.] Here nothing appears which is the subject of a common law church-rate except the spouting *Saint George's* Chapel. [Lord Campbell C. J. That item may be larger or smaller: but it cannot be supplied from the same fund as the providing of an additional burial ground.] The whole is the subject of church-rate.

LORD CAMPBELL C. J. I should be sorry to decide this case on the first objection. At present, indeed, I see no sufficient authority for laying a rate for the purpose of enlarging the burial ground: but it is not impossible that some authority might be found in one of the two Acts. But, as to the third objection, I have no

(a) 12 Q. B. 321.

doubt. The rate for the purpose of spouting the chapel is a church-rate, authorized by common law. But the common law gives no power to rate for the purpose of enlarging the burial ground. It is very proper that there should, in a Christian country, be some power of providing additional means of sepulture as population increases: but for that a statute is requisite. Now here the statutes prescribe peculiar modes of making the rates which they authorize; there are regulations as to dissents, consents, and so on, of which none apply to the common law church-rates. It cannot therefore be lawful to lay on one rate for both purposes: and, this rate being thus bad, we cannot call on the magistrates to enforce it.

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ERLE J. For the purpose of the third objection, it is to be assumed that the statutes give power to lay a rate for the purpose of providing additional burying ground. But then this is a rate which has incidents different to those of a common law church-rate: and, that being so, the two must not be blended. Whether the words "enlarging or otherwise extending the accommodation in the then existing churches or chapels" (*a*) comprehend the making additions to the burial ground is a matter well worth further inquiry. I find that 2 stat. 35 *Ed.* 1. recites that "a church-yard that is dedicated is the soil of a church."

CROMPTON J. I do not see how there can be one good rate for common law purposes and also for those of the Acts: the machinery is altogether different; a rate for one would become valid long before a rate for

(*a*) Stat. 58 *G.* 3. c. 45. s. 59. See also stat. 59 *G.* 3. c. 134. s. 25.

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the other. I do not see how the parishioners can give their assents or dissents under the common process for laying a church rate.

(No fourth Judge was present.)

Rule discharged.

Wednesday,
 May 31st.

The QUEEN *against* The DERBYSHIRE, STAFFORDSHIRE and WORCESTERSHIRE Junction Railway.

Under sect. 36 of The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16.), a party who has recovered judgment against a company is not precluded from issuing execution against the shareholders who have not paid up for their shares, though lands of the company have been delivered on elegit, if the proceeds of the lands be insufficient to satisfy the debt.

Therefore, in such a case, a mandamus issued commanding the Company to give the creditor inspection of the register of shareholders.

MANDAMUS to *The Derbyshire, Staffordshire and Worcestershire Junction Railway Company*. The writ recited that, by *The Derbyshire, Staffordshire and Worcestershire Junction Railway Act, 1847 (a)*, the Company were incorporated by the name before mentioned, and were authorized to construct the railway and works therein mentioned: and, by the said Act, it was, amongst other things, enacted, that The Companies Clauses Consolidation Act, 1845, and certain other Acts of Parliament should be incorporated with, and form part of, the first mentioned Act. That, in pursuance of the powers given by the first mentioned Act, and the said Acts incorporated therewith, the Company had taken divers proceedings in and towards the execution of the objects and purposes in the said Acts mentioned,

(a) Stat. 10 & 11 Vict. c. cx., local and personal, public: "To authorize the construction of a railway from Cannock in the county of Stafford to Uttoxeter in the same county, to join *The North Staffordshire Railway Potteries Line*, by a company to be called *The Derbyshire, Staffordshire and Worcestershire Junction Railway Company*" (sic).

and had raised divers sums of money by calls on the several persons being shareholders in the Company, and had kept, and had now, in their custody, possession or controul, a book called The Register of Shareholders, containing the names of the several corporations and the names and addresses of the several persons entitled to shares in the said Company, and the amounts of the subscriptions paid upon such shares, and certain other particulars required to be entered therein by The Companies Clauses Consolidation Act, 1845. That the Company, since the period of their incorporation, had incurred divers debts to divers persons, and, in particular, a certain debt to one *John Addison*, for (to wit) 1572*l.*; for which debt an action was heretofore, to wit on 13th *December* 1852, brought by *J. Addison* against the Company in the Court of Exchequer; and in which action, afterwards, to wit on 22d *June* last, judgment was recovered and signed by *J. Addison* against the Company for the said sum of 1572*l.* That a large &c., to wit 800*l.*, was now due and payable under the said judgment: and *J. Addison* was and is entitled to levy the same by execution under the said judgment. That *J. Addison* had endeavoured to levy the said sum of 800*l.* against the property and effects of the Company, and, for that purpose, had issued certain writs of execution out of the Court of Exchequer, to wit a writ of fieri facias, and also a certain writ of elegit, against the Company, and had endeavoured to levy the last mentioned sum on the said respective writs, but had wholly failed therein; and there hath not been, and cannot be, found sufficient property and effects of the Company whereon to levy such execution; and the said 800*l.* still remains wholly unpaid and unsatisfied. That *J.*

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1854. *Addison*, not being able to levy any such execution against the property and effects of the Company, had been and was desirous of issuing execution against the shareholders of the Company, to the extent of their shares respectively in the capital of the Company not paid up, and of obtaining an order of the Court of Exchequer for that purpose, pursuant to the provisions of the said last mentioned statute in that behalf. That *J. Addison*, for the purpose of obtaining such order and issuing such execution as last aforesaid, had been and was desirous of inspecting the said Register of Shareholders in the Company, for the purpose of ascertaining the names of such shareholders, and the amount of capital remaining to be paid upon their respective shares. That the Company had been duly required, by and on behalf of *J. Addison*, to produce the Register to him, in order that he might inspect the same for the purpose aforesaid; but the Company had neglected and refused, and did still neglect and refuse, to produce the same to him. The writ then commanded the Company to produce to *J. Addison* the Register, and allow him to inspect the same for the purpose &c.; or to shew cause &c.

Return. "We, *The Derbyshire, Staffordshire and Worcestershire Junction Railway*, do most humbly certify" &c., "that, by the first statute within mentioned, we were and now are incorporated by the name of *The Derbyshire, Staffordshire and Worcestershire Junction Railway* (a), and not by the name of *The Derbyshire, Staffordshire and Worcestershire Junction Railway Company*, or any other name whatsoever than the said name of *The Derbyshire, Staffordshire and Worcestershire*

(a) Stat. 10 & 11 Viet. c. cx. s. 4.

Junction Railway. And we, *The Derbyshire, Staffordshire and Worcestershire Junction Railway*, do further most humbly certify and return" that the writ of elegit mentioned was a writ of elegit issued by *J. Addison* upon the judgment recovered by him as mentioned, and was directed to the sheriff of *Staffordshire*: and that, under and by virtue of the said writ, the sheriff, before the issuing of the within writ, to wit on 7th *January* 1854, duly and according to law caused to be delivered to *J. Addison*, at a reasonable price and extent in that behalf, divers, to wit five, closes, pieces or parcels of land situate and being in the parish of *Cannock* in the said county, and of and in which defendants were seized in their demesne as of fee at the time of entering up the said judgment, to hold to him and his assigns according to the form of the statute in such case made and provided, until the sum of money and interest in the writ of elegit mentioned should be thereof levied, as by the last mentioned writ the sheriff was commanded. And that the sheriff, before the issuing of the within writ, to wit on the day and year last aforesaid, duly returned the writ of elegit; as by the said last mentioned writ &c. will more fully and at large appear. "That the said execution, so levied as aforesaid, has not been in any way reversed, annulled or vacated, but still remains in full force and virtue: and that *J. Addison* has not been evicted from the said closes, pieces or parcels of land so delivered to him as aforesaid: and therefore we humbly submit to our Sovereign Lady the Queen that, for the causes aforesaid, we ought not to be required to produce to the said *J. Addison* the said Register of Shareholders, and allow him to inspect the same, as by the within writ we are commanded."

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Plea, by *J. Addison*. That the several closes and pieces or parcels of land in the return mentioned, and therein alleged to have been caused to be delivered to *J. Addison*, by the sheriff of *Staffordshire*, were, at the time of the alleged delivery to the said *J. Addison*, found by the sheriff to be, and in fact were, of the yearly value of 10*s.* in the whole, and no more, as by the return of the sheriff to the writ of *elegit* will more fully appear. That the yearly interest alone upon the said judgment debt of *J. Addison*, and which the sheriff was commanded to levy by the said writ of *elegit*, was of far greater amount than the entire yearly value of the said closes and pieces or parcels of land. That, by reason of such insufficiency of value of the said closes and pieces and parcels of land, it became and was impossible for him to levy his said execution, and obtain satisfaction of the said sum of money and interest in the writ of *elegit* mentioned from and out of the lands of the Company. And *J. Addison*, in consequence thereof, did not enter into or take the actual possession of the said closes and pieces or parcels of land, or any of them, or any part thereof; nor did he bring any action of ejectment for the recovery of the actual possession thereof, or of any part thereof: but he hath wholly declined and refused so to do. Verification.

Demurrer. Joinder.

Hugh Hill, for the defendants. The misnomer makes the writ bad; *Rex v. The Mayor, &c. of Rippon* (a). [*G. Hayes*, for the Crown, prayed that the writ might be amended, by the omission of the word *Company*.

(a) 2 Salk. 433.

The Court ordered the amendment to be made.] The other question arises under The Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c. 16.*). By sect. 36, "If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up: provided always, that no such execution shall issue" except on motion and order in the Court where the action &c. is brought; "and upon such motion such Court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee." The condition precedent to the inspection is therefore that execution shall have been issued against the effects of the Company, and the impossibility of finding "sufficient whereon to levy such execution." But here an *elegit* has issued; and the land has been delivered to the creditor: and, after *elegit*, the plaintiff is considered in law to be fully satisfied by the proceeds of the land. "When the plaintiff has execution of the lands of the defendant and afterwards the lands are evicted, there, before the statute of 32 *H. 8.* (a) he should not have any new execution, for the execution of the lands was valuable and accounted

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(a) Stat. 32 *H. 8. c. 5.* gives a *scire facias* for the residue of the debt where lands delivered in execution are evicted, out of the possession of persons holding them in execution, before the whole debt is levied.

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in law for a satisfaction, and for avoiding of infiniteness there should be but one valuable execution or executions with satisfaction at the common law." *Blumfield's Case* (a). And the same principle appears from *Crawley v. Lydgeat* (b), *Foster v. Jackson* (c), 3 *Bac. Abr.* 393 (7th ed.), tit. *Execution* (D), note (1), to *Underhill v. Devereux* (d). *Crawley v. Lydgeat* (b) is a very strong case: there was no actual satisfaction: the lands of one of two joint and several obligors had been delivered on elegit upon an action against one; then an action was brought against the other, judgment recovered, and a ca. sa. issued; and the Court relieved the defendant in the second action upon auditâ querelâ, apparently in analogy to the law which prevails in case of a release to one of two joint and several obligors (e). In order to apply sect. 36, it must be shewn what sum is owing: but that cannot be done where lands have been delivered on elegit, because they may be held till the whole debt is received. If a fi. fa. had been levied, and the sheriff had returned that he had taken goods which remained in his hands for want of buyers, it could not be said that execution had not been levied. Under stat. 7 G. 4. c. 46. s. 13., the question is whether a party applying for scire facias against shareholders has done all in his power to obtain satisfaction, but ineffectually; *Harvey v. Scott* (g), *Field v. Mackenzie* (h), *Dodgson v. Scott* (i). An elegit would not be necessary to shew this where the lands were worthless:

(a) 5 *Rep.* 86 b. 87 a.(b) *Cro. Jac.* 338.(c) *Hob.* 52, 58, 59.(d) 2 *Saund.* 68 d. (6th ed.).(e) 6 *Bac. Abr.* 627 (ed. 7.), *Release* (G).(g) 11 *Q. B.* 92.(h) 4 *Com. B.* 705.(i) 2 *Exch.* 457.

and a similar reasoning would apply here: so that the creditor has himself only to blame for the difficulty in which he is placed. No stress can be fairly laid on the words "such execution," in sect. 36 of The Companies Clauses Consolidation Act, 1845.

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G. Hayes, contra. The *elegit* issued in consequence of a doubt which has been suggested, in the Court of Exchequer (*a*), whether a creditor of a Company could be entitled to the benefit of sect. 36, before taking out *elegit* against any land which the Company might have. Here the debt will clearly not be satisfied, either principal or interest, from the lands. [*Erle J.* We can hardly decide this question upon the ground of what may seem reasonable or not. Suppose 10,000*l.* is owing from a man, and he is taken under a *ca. sa.*; that satisfies all in law.] The question under sect. 36 is, Whether there can "be found sufficient whereon to levy such execution." The remedy is entirely under the statute: of course, without the statute, the *elegit* would preclude any other execution. [*Crompton J.* Even according to Mr. *Hill's* argument, the statutable remedy is not entirely gone. The judgment still stands; and an *elegit* might therefore go against fresh lands.] (*G. Hayes* was then stopped by the Court.)

Lord CAMPBELL C. J. I am of opinion that the prosecutor is entitled to the remedy which he seeks. There are two conditions to be fulfilled before a creditor proceeds against the individual shareholders: first, that "any execution" shall have issued against the property

(*a*) The reference is probably to *Rastrick v. Derbyshire, Staffordshire, and Worcestershire Junction Railway Company*, 9 *Exch.* 149.

1854. of the Company ; secondly, that " there cannot be found
 The QUEEN sufficient whereon to levy *such* execution." Now, the
 v.
 DERBYSHIRE, elegit having issued, can there be found sufficient
 &c. Railway. whereon to levy? The proceeds of the elegit clearly are
 not sufficient. Both conditions, therefore, are fulfilled ;
 and the prosecutor is entitled under the express words
 of the statute.

ERLE J. I also am of opinion that we ought to give judgment for the prosecutor. That clearly furthers the intention of the statute, which is, that the attempt should first be made to obtain satisfaction from the property of the company, and, that failing, satisfaction should be had from such shareholders as have not paid up for their shares. There is therefore to be a thorough examination whether the company has any funds to satisfy the judgment ; and that has been done here. I am glad that no technical objection intervenes to prevent us from giving effect to the intention of the Legislature. Another elegit might issue ; the prosecutor is therefore a " person entitled to any such execution."

CROMPTON J. I think we ought to import no technicalities into the operation of the statute. The provision is new. The creditor is first to see what he can get from the Company ; if he cannot get enough to satisfy his debt, a fresh remedy is given ; but it is not a fresh execution. I see no reason for applying the old technical rules to such a case.

(No fourth Judge was present.)

Judgment for the Crown.

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The Churchwardens and Overseers of the Poor
of the Parish of St. ANNE, WESTMINSTER,
against The LINNEAN SOCIETY of LONDON.

Wednesday,
May 31st.

ON 24th March, 1853, a rate for the relief of the poor was made and allowed by a magistrate acting for the Liberty of *Westminster* for the above parish, in which the Linnean Society was assessed for the house No. 32, *Soho Square*, as below.

The Linnean Society of London was incorporated by Royal charter for the cultivation of the science of natural history in all its branches, and more especially of the natural history of *Great Britain and Ireland*.

It was supported by admission fees and contributions of its own fellows, who entered into an engagement to make the payments, and were liable to ejection for non-payment.

Name of Occupier.	Description of Property rated.	Name or situation of Property.	Rateable value.
<i>Linnean Society. Robert Brown.</i>	House. House.	32, <i>Soho Square</i> . 17, <i>Dean Street</i> .	£124. 60.

The Linnean Society having objected to this rate, a case was submitted to this Court, under stat. 12 & 13 *Vict. c. 45. s. 11.*, which, in substance, was as follows.

The Society claims exemption from rate, on the ground that it comes within stat. 6 & 7 *Vict. c. 36*.

The fellows were entitled to receive copies of the published transactions.

Held, that the Society was exempt from rate, in respect of premises occupied for their business, under stat. 6 & 7 *Vict. c. 36. s. 1.*, as being instituted for purposes of science exclusively, and supported by annual voluntary contributions; *Crompton J.* hesitating as to the question whether the payments were voluntary.

The Society let off some rooms of the house in which they transacted their business to *B.*, the occupier of the adjacent house, granting him also free use of the hall and staircase and passages of their house. Held, that this did not make the Society rateable for the rooms which they occupied for the purposes of the institution.

The librarian and porter, whose attendance in the house was necessary for the purposes of the institution, occupied rooms in the part of the house retained by the Society, and, in consideration thereof, received less salary. Held, that the Society were occupiers of these rooms, for the purposes of the institution, and that no rate could be laid in respect of such rooms.

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The Society was incorporated by a Royal charter, dated 26th *March* 1802, for the purposes therein mentioned, and has been conducted in conformity with the provisions of that charter unless the facts stated in this case are inconsistent with such purposes.

A printed copy of this charter, together with all its by-laws, accompanied the case, and was to be taken as part of it.

The charter recited that several of the King's subjects "are desirous of forming a society for the cultivation of the science of natural history in all its branches, and more especially of the natural history of *Great Britain and Ireland*, and, having subscribed considerable sums of money for that purpose, have humbly besought Us to grant unto them, and such other persons as shall be approved and elected, as hereinafter is mentioned, Our Royal charter of incorporation for the purposes aforesaid." The charter then incorporated certain persons (named) by the name of *The Linnean Society of London*, with an indefinite number of fellows (the first fellows were named), with a council of fifteen of the fellows, and with officers designated in the charter. Power for appointing fresh officers and electing and removing fellows and members were given: "and that the council hereby appointed, and the council of the said Society for the time being, or any five or more of them, all the members thereof having been first duly summoned to attend the meetings thereof, shall and may have power, according to the best of their judgment and discretion, to make and establish such by-laws as they shall deem useful and necessary for the regulation of the said Society, and of the estate, goods, and business

thereof; and for fixing and determining the times and places of meeting of the said Society, and also the times, place, and manner of electing, appointing, and removing all fellows, honorary members, foreign members, and associates, of the said Society, and all such subordinate officers, attendants, and servants, as shall be deemed necessary or useful for the said Society; and also for filling up, from time to time, any vacancies which may happen by death, removal or otherwise, in any of the offices or appointments constituted or established for the execution of the business and concerns of the said Society; and for regulating and ascertaining the qualifications of persons to become fellows, honorary members, foreign members, and associates, of the said Society respectively, and also the sum and sums of money to be paid by them respectively, whether upon admission or otherwise, towards carrying on the purposes of the said Society; and such by-laws, from time to time, to vary, alter, or revoke, and make such new and other by-laws as they shall think most useful and expedient, so that the same be not repugnant to these presents, or to the laws of this Our Realm." Regulations were added as to the mode of making, altering and repealing by-laws.

The parts of the by-laws material to the argument and judgment, and not mentioned in the body of the case, were the following.

Chapter I.

"Section I. Every fellow who intends to propose any person to be a fellow of the Society, shall, before such person be proposed, make known to him the nature of the obligation into which he is to enter, in the event of his being elected; and also the sum which is to be paid for admission money, the rate of annual payments,

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and the sum to be paid in lieu of annual payments, for the use of the Society."

"VII. No person elected shall be admitted a fellow of the Society, until he shall have paid his admission fee, and signed the usual obligation for the payment of yearly contributions, or paid the sum appointed in lieu of such contributions."

"X. No person shall be deemed an actual fellow of the Society, nor shall the name of any person be printed in the annual list of the fellows of the Society, until such person shall have paid his admission fee, and signed the usual obligation for the payment of annual contributions, or paid the sum appointed in lieu of such contributions; and no such person shall have liberty to vote at any election or meeting of the Society, before he shall have been admitted as directed in the preceding section."

Chapter II.

"Sect. I. All fellows elected on or before the twenty-fourth day of *May* 1802, who have already paid their admission fees, but have not paid the sum of ten guineas at one payment, in lieu of all annual contributions, shall pay to the use of the Society the annual sum of one guinea; the first payment to become due on the twenty-fourth day of *May* 1803. Provided, however, that every such fellow may, at any time, compound for all future annual payments by paying the said sum of ten guineas, including the annual guinea which may be due at the time such composition shall be paid."

Sects. II., III., IV., V., make provisions for the payments of admission fees, annual contributions, or compositions, in the cases of fellows elected at times later than 24th *May* 1802.

“VI. All yearly contributions shall be considered due and payable at each anniversary meeting for the year preceding; but no fellow elected on or after the first day of *February* in any year, shall pay the annual contribution at the anniversary meeting which shall immediately follow his election.”

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“VII. If any fellow paying yearly contributions should fail to bring, or send in the same to the treasurer, within twelve months after each anniversary meeting, unless the said payment be remitted in whole or in part by special order of the council, his obligation shall be put in suit for the recovery thereof, and he shall be liable to ejection from the Society; upon which the council shall proceed as they may see cause.”

Chapter VI.

“Section II. No fellow shall be understood to have withdrawn himself from the Society, until he shall have signified such his intention by letter, under his hand, addressed to the president; and if such letter be not left at the apartments of the Society, between the twenty-fourth day of *May* in any year and the first day of *February* next following, the contribution of such fellow shall be understood to be continued for the whole of the year in which he shall have so withdrawn himself.”

Chapter XV.

“Sect. I. The transactions of the Society shall be printed at such times, and in such manner, as the council for the time being shall direct, at the sole charge, and for the sole use and benefit of the Society.”

“II. Every fellow, whose payments to the Society shall have been paid up to the time of publication of

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each volume of the Society's transactions, shall be entitled to one copy of such volume; but no fellow who shall not have paid the sum appointed in lieu of all annual payments, or paid at least one yearly contribution at the time of publication, shall be considered as entitled thereto."

The Society was duly certified, by the barrister authorized for that purpose, to be entitled to the benefit of the statute. The by-laws of the Society provide that it shall not make any dividend, gift, division or bonus in money unto or between any of its members, and have also been duly certified.

The officers of the Society are a president, a treasurer, a secretary, a clerk, librarian and housekeeper, and a porter.

The business of the Society is managed by the president and such fellows as are members of the council in the manner prescribed in chapter xiv. of the by-laws: and meetings are held periodically, at which papers regarding natural history are read and discussed; and such of them as it is the sense of a standing committee of the Society should be published (by-law chap. xiv.), are printed in their transactions.

Between 300 and 400 copies of the transactions are circulated amongst the fellows. Others are sold to the public. And about 50 other copies are gratuitously distributed amongst other institutions both at home and abroad. The printing, publication and sale of these transactions do not defray their own expences; and the only object of the Society, in so selling, is to reduce the expences incurred by them in such printing, publication and sale.

Some of the fellows pay annual contributions. Others pay the sum appointed in lieu of annual contributions. The Society is partly supported by these several contributions. No contribution or payment of any kind is made by honorary members, foreign members or associates.

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The fellows are entitled to have gratis a copy of all those transactions which are published subsequently to their having paid the first annual subscription, or the sum in lieu of all annual contributions. The transactions are published by *Longman & Co.*, booksellers, who sell them to the public by commission, at a fixed price, making to the purchaser, if he be a bookseller, the usual allowance of 25 per cent. Other copies of these publications are kept at the Society's house for sale, where they may be purchased by the public on the same terms as if bought at *Longman & Co's*. But all those fellows who may wish to have those volumes which may have been published before they became subscribers are allowed the booksellers' privilege of purchasing them at a reduction of 25 per cent. The only object in making an allowance to fellows on the purchase of volumes or parts of the transactions is to enable them to purchase at a reduced price those volumes or parts which were published before their admission as fellows.

The clerk, librarian and housekeeper of the Society occupies, as his dwelling, two rooms within the house, No. 32 *Soho Square*, and wholly lives there. The library, museum and other matters of the Society under the care of this officer are very valuable. The porter of the Society also dwells in the house No. 32. And it is admitted by the parish officers that it is convenient

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and reasonably necessary that the porter should so dwell there. The clerk, librarian and housekeeper, and the porter, respectively, receive salary or wages for their services, and pay no rent for the use of the rooms in which they dwell, the value of the permissive use of such rooms being however taken into account in fixing the amount of salary. The remainder of the apartments is entirely appropriated to a museum, library and other rooms suitable to and necessary for the purposes of the Society: and no part of them is unoccupied.

The premises included in the rate were originally one house only, and formed the town mansion of the late Sir *Joseph Banks*, and were rated as one tenement (viz. as No. 32, *Soho Square*), in one sum of 184*l.* per annum. Sir *Joseph's* principal apartments were in the part fronting *Soho Square*; but the whole of that part of the house which was in *Dean Street* was also occupied by him; part of it consisting of his library, and the rest of it of apartments appropriated for the use of different portions of his family. Sir *Joseph Banks*, by his will, left the residue of a term which he had in this property to Mr. *Robert Brown*. Soon after his death, Mr. *Brown* underlet to the Linnean Society, not the whole house, but a certain portion of it fronting *Soho Square*, and reserved to himself the remainder, which he occupied. In 1851, Mr. *Brown's* lease expired. And, at the latter end of that year, the Society took from the freeholder a lease, for twenty-one years, from *Michaelmas* 1851, of the whole property included in the respective assessments on the Society and Mr. *Brown*, and which had been previously held by Mr. *Brown*; and on 6th *May* 1851, by lease (which formed part of the case), underlet to Mr. *Brown*, for twenty one years, wanting two days,

from *Michaelmas* 1851, the same premises which he had reserved to himself when he underlet to the Society; that is to say:

Firstly: "All that messuage or tenement, dwelling house and private museum, outbuildings, part of yard, area, stairs to basement, inclosed passage, and other the premises coloured" &c. in the plan in the margin, "which said premises are on the east side of *Dean Street* in the parish of *St. Ann, Soho*, in the county of *Middlesex*, numbered 17 in the same street, and are situate at the rear of a certain messuage or dwelling house hereinafter mentioned, situate and being at the south west angle of *Soho Square*, in the said parish of *Saint Ann, Soho*, and at No. 32 in the same Square." And, secondly: "All such rooms and accommodations in the said messuage, No. 32 in *Soho Square*, as are hereinafter mentioned; that is to say, two rooms on the ground floor, marked" &c. on the plan; "one room on the second floor, on part of the same site, called the northern back room, the windows of which face to the west; two small back rooms (on the attic floor over the great room), the windows of which face to the west; together with the use, in common with the said Linnean Society, their successors and assigns, of the hall, staircase and passages forming part of the said dwelling house No. 32, leading to the said rooms and premises demised, for the purpose of passing and repassing at all times to and from the same."

The premises No. 17 *Dean Street*, firstly above demised, are wholly, and are alone, included in the assessment on Mr. *Brown* above set forth.

Under such underlease, Mr. *Brown* has ever since

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occupied and enjoyed the premises and rights so demised and granted to him.

If the Court shall be of opinion that the Society is not exempted from the rate, the rating of 124*l.* is to stand as confirmed against them. If the Court shall be of opinion that such exemption exists as to all the property except the rooms used as residences by the clerk and by the porter as aforesaid, then the rate of the Society to be reduced to the sum of 24*l.* rateable value in respect of such rooms only. But, if the Court shall be of opinion that there is a complete exemption from liability to poor rate in respect of all such premises then the rate is to be amended by striking out the sum of 124*l.* inserted as rateable value in the said assessment on *The Linnean Society*: the parties agreeing that judgment, in conformity with the decision of this Court and for such costs as this Court shall adjudge, may be entered on motion by either party at the general quarter sessions of the peace for *Middlesex*.

Pashley, for the respondents. It must be admitted that this Society is instituted for purposes of science exclusively, and, so far, is within the exception given by stat. 6 & 7 *Vict. c. 36. s. 1*. But a question arises whether it is "supported wholly or in part by annual voluntary contributions," which, by the same section, is also necessary to the exemption. It appears that either annual contributions are paid, or a sum in lieu thereof under ch. ii. of the by-laws. There is nothing else in the nature of contribution; and this is not voluntary for, if any fellow refused to pay, he would of course be ejected, under ch. ii. s. 7. [Lord *Campbell* C. J. N

one is compelled to continue a fellow. Suppose a party gave a bond, conditioned for the payment, would the payment be the less voluntary? If the undertaking to contribute be voluntary at the outset, does it become compulsory afterwards?] In *Russell Institution v. Vestry of St. Giles* (a) this Court, in a case not materially differing from the present as to this point, doubted whether the contributions could be called voluntary. By the by-laws, ch. vi. s. 2., the contributions are required for the whole year in the course of which a fellow withdraws himself, unless he have given notice in the manner and during the time there specified. The payment of rent by a tenant from year to year is not voluntary, though, by taking proper steps, he can put an end at once to the tenancy and liability. [*Crompton J.* Payment of rent is not contribution in any sense of the word. *Erle J.* Suppose a man directs by will that his executor shall pay 100*l.*] That is voluntary on the part of the testator, but not on the part of the executor. The next question is, Whether the underlease of a part of the premises to *Brown* does not put an end to the exemption. As to the part let, the exemption seems not to be insisted on. [*Cowling*, contra, admitted that there must be a rate in respect of so much.] The question still is, whether this does not destroy the exemption as to the whole. The premises must be occupied solely for the scientific purpose; it is not enough that the rent be applied to the purpose; *Purvis v. Traill* (b), *The Earl of Clarendon v. The Rector &c. of St. James's* (c). *Regina v. Overseers of Manchester* (d) may be cited on the other side: but

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(a) Ante, p. 416.

(b) 3 *Exch.* 344.(c) 10 *Com. B.* 806.(d) 16 *Q. B.* 449.

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The Earl of Clarendon v. The Rector &c. of St. James's, a later case, appears to decide that in such a case the exemption is put an end to as to all the premises. Lastly, the occupation by the librarian and porter cannot be considered as an occupation for the scientific purposes of the Society: they hold, partly, in lieu of salary; and the case falls within the principle of *Gambier v. Overseers of Lydford* (b), which agrees with *Regina v. Temple* (c).

Cowling, contra, was not called on.

LORD CAMPBELL C. J. I think the appellants are entitled to the exemption from rate. It is conceded that the Society is instituted exclusively for scientific purposes: that fulfils one condition of stat. 6 & 7 Vict. c. 36. s. 1.: the case is very different from that of a musical club or a subscription instituted for the purpose of enabling the subscribers to read newspapers, or amuse themselves in any other way. Here the exclusive object is science. Then, is the Society maintained partly by voluntary contributions? I am clearly of opinion that it is. For, though the fellows are under an obligation to pay while they continue fellows, the payment is still voluntary, seeing that the obligation was incurred by a voluntary engagement, from which the fellows are at liberty to withdraw; though I do not say that, even if they had no longer the power to withdraw, the payment would be the less voluntary. The case in no way resembles that of *The Russell Institution* (d), where newspapers

(a) 10 Com. B. 806.

(b) Ante, p. 346.

(c) 2 E. & B. 160.

(d) *Russell Institution v. Vestry of St. Giles*, ante, p. 416.

were supplied, and accommodations given to the subscribers, preventing the payments from being mere voluntary contributions for the promotion of science. It is true that here copies of the proceedings are furnished to each member: but that is done only to forward the scientific object by communicating information to the members. Then, as to the underletting. If the Society made any use of the premises which was not connected with the scientific purpose, they would be properly considered as not occupying exclusively for that purpose. But the underletting is of a distinct part to a person who occupies for his own purposes, and is rateable in respect of such part. The Society are not occupiers of that part, and cannot be rated in respect of it. They cannot lose their indemnity because there are rooms in the house which they do not want, and which they therefore let off. Then, as to the occupation by the porter. I assume that this is subsidiary and necessary to the purposes of the Society: if so, it is an occupation by the Society through their porter and for their own purposes; and this does not destroy the exemption.

ERLE J. I also am of opinion that this rate must be amended. The Society clearly is one which, according to the Act, fulfils the condition of being instituted for purposes of science exclusively, and supported in part by voluntary contributions, unless the special grounds of objection can be made good. It is suggested that the payments are not voluntary, because every fellow becomes liable to the payment. But this subscription is in the nature of a gift for the purpose of science, nothing being received back for the personal profit of the party paying: and it is voluntary, inasmuch as a

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party by withdrawing his name will cease to pay. I quite immaterial, in this question, whether a party simply cease to pay, or must withdraw his name before doing so. As to the underletting, the matter is on fact: the case is like that of two contiguous houses. Some rooms in the Society's house are in fact not wanted and these are let to the occupier of the contiguous house. An arrangement often made in contiguous houses. The premises let are to be taken as part of *Brown's* house. The third question is as to the residence of the librarian and porter. The liberty of occupying for the purpose of science, free from rate, clearly could not exist unless some one was in attendance on the premises: so that the question is whether the occupation of the person in fact subsidiary; and the statement of the case shows that it is so.

CROMPTON J. During the argument, I was not without doubt whether the Society was supported in part by voluntary contributions; whether the statute is satisfied by the contributions being voluntary at the time when the contributor first undertakes to pay, or whether every payment must be voluntary. I do not wish to put a narrow construction on the statute; but I do not see my way very clearly to the conclusion which the rest of the Court draw. As to the letting off a portion of the house, *Regina v. Overseers of Manchester* (a) shows that the part occupied by the Society may be exempt from rate, though a part is let off. I see no distinction between taking a house and letting off a room, and taking a room. The occupation by the librarian and

(a) 16 Q. B. 449.

porter is clearly an occupation by the Society for the purposes of the institution.

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(No fourth Judge was present.)

Judgment for appellants (without costs).

The Vestrymen of the Parish of ST. MARYLEBONE
in MIDDLESEX *against* The ZOOLOGICAL SOCIETY
OF LONDON. *Wednesday,*
May 31st.

THE parish of *St. Marylebone* in the county of *Middlesex* is governed by several local Acts of Parliament (a), in pursuance whereof the vestrymen of the parish made a rate, on 19th *June* 1852, upon the occupiers of lands and buildings in the parish, included

The Zoological Society was incorporated by charter "for the advancement of Zoology and Animal Physiology, and the introduction of new and

curious subjects of the animal kingdom." They occupied land on which were buildings appropriated as receptacles for housing animals and birds, and as a museum for stuffed specimens. Three acres, not so appropriated, were cultivated as a flower garden. Refreshment rooms on the premises were occupied for the purpose of supplying refreshment to visitors, by *M.*, who paid to the Society a rent for this privilege. The public were admitted to the grounds, either by paying money upon each admittance, or by tickets given to them by the fellows. Once in the week, for three months in the year, the Society procured the attendance of a musical band.

Held: that the Society was not exempt from rate, under stat. 6 & 7 *Vict. c. 36. s. 1.*, the premises not being occupied exclusively for the purposes of science.

The Society was supported in part by annual contributions from the fellows and subscribers. Each fellow was entitled to personal admission, with a specified number of companions, on every day, and could also give admission at certain times by written orders and tickets, to which he was entitled: and fellows were also entitled to purchase tickets giving free admission to the bearer. Subscribers also were entitled to purchase annually an ivory ticket, admitting a named person of their family, with a companion.

Semble: that the annual contributions by the fellows were not voluntary contributions within the meaning of sect. 1, inasmuch as the fellows and subscribers obtained a benefit, not purely scientific, in consideration of the payments.

(a) 35 *G. 3. c. 73.*, 46 *G. 3. c. xc.* (local and personal, public), 51 *G. 3. c. cli.* (local and personal, public), 53 *G. 3. c. clxiii.* (local and personal, public), 1 & 2 *G. 4. c. xxi.* (local and personal, public), 3 *G. 4. c. lxxiv.* (local and personal, public), 6 *G. 4. c. 124.*, 7 & 8 *G. 4. c. lxxxix.* (local and personal, public).

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 of a chartered society called *The Zoological Society of*
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The Society, on 28th October 1843, obtained the certificate of the barrister appointed by stat. 6 & 7 Viet. c. 36., that the Society was entitled to the benefit of exemption from county &c. rates, in respect of lands and buildings occupied by them; which certificate was duly sent to the clerk of the peace of the county, confirmed, and filed in 1843. After the making of the said rate, the Society appealed to the vestrymen of *St. Marylebone* against the same: but, the Society not being satisfied with the determination of such vestrymen, and having given notice of their intention to appeal to Sessions, the vestrymen and the Society agreed, by consent, and by order of *Coleridge J.*, to state the facts for the opinion of this Court, in a case, which was substantially as follows.

The Zoological Society was incorporated by Royal Charter on 27th March 1829, "for the advancement of Zoology and Animal Physiology, and the introduction of new and curious subjects of the animal kingdom."

The land and building occupied by the Society in the parish of *St. Marylebone* consist of a piece of land situate in the *Regent's Park*, containing in the whole 25½ acres, and of buildings, houses or receptacles for housing animals, mostly imported by the Society from foreign parts; portions of which buildings are fitted up and used as the residences of keepers; as also aviaries, a museum for stuffed birds and animals, a porter's lodge, and greenhouses.

The management of the affairs of the Society is vested by the charter in a president, treasurer, secretary

and council; such council to consist of 21 fellows including the president, treasurer and secretary.

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By one of the Society's by-laws, the admission fee of a fellow is fixed at 5*l*. The annual contributions of those elected before 6th *December*, 1832, at 2*l*, and the composition in lieu thereof at 20*l*; the annual contribution of fellows elected after that date is fixed at 3*l*, and the composition at 30*l*. By another of the by-laws, "ladies may be admitted as fellows upon the same terms, with the same privileges, and under the same regulations in all respects as gentlemen." At the date of the rate, the number of fellows was 1650, of whom 86 were ladies.

By another of the by-laws it is provided that "no dividend, gift, division, or bonus, shall be made by the Society, unto or between any of its members." Another of the by-laws provides for the admission of annual subscribers, to be elected by the council, the annual contribution of such subscribers to be 3*l*. The by-laws also provide for the admission of honorary, foreign and corresponding members, none of them to be liable to any fees or contributions.

Fellows, annual subscribers, honorary, foreign and corresponding members, are entitled to one copy of the scientific proceedings of the Society on application at the office, and are entitled to purchase the transactions and other publications of the Society at 25 per cent. less than the price charged to the public. They may obtain, on the payment of one guinea annually, an ivory ticket which will admit a named person of their immediate family to the gardens and museum, with one companion daily. Each fellow is entitled to personal admission with two companions on every day. On a

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Saturday he may give written orders for admission to two persons, instead of a personal introduction; and on *Sunday* may be accompanied by two persons, and may give two written orders for admission. Each fellow has twenty tickets, which such fellow signs, and each of which admits one person on any one day in the year.

They may have a transferable ivory ticket, admitting two persons, available throughout the whole period of fellowship, on payment of 10*l.* in one sum. They may also obtain any number of tickets, in addition to those to which they are entitled, for the free admission of the bearer at any time except on *Sundays*, without their personal introduction, on payment of one shilling per ticket for adults, or sixpence per ticket for children, at the Office of the Society No. 11 *Hanover Square*.

The Society also, on special application to the council, gives gratuitous admission annually to about 10,000 children belonging to the charity schools of *London* and the vicinity. The Society also gives free admission to students at the Royal Academy, at the School of Design, and to all artists native and foreign who are properly recommended as likely to benefit by the privilege. And the Society has presented many valuable subjects, which have died in their menagerie, and also subjects from their museum, to the provincial and metropolitan collections of natural history.

The gardens and museum of the Society are open to the public every day except *Sundays*; and the price charged for admission (which is paid at the entrance gates) is one shilling for adults, and for children sixpence, except on *Monday*, when it is sixpence for all. During *Easter* week the charge is sixpence every day, except on *Saturday*, when it is one shilling. This reduction is

advertized in the daily papers; and placards are posted up, announcing the same. On *Sundays*, throughout the year, members and persons with orders or introductions obtained as aforesaid are alone admitted.

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Confectionery and other refreshments are sold in the gardens by a Mr. *Masters*, who for some years past has carried on that business by permission of, and on making an annual payment to, the Society, under agreement with the Society. The agreement in that behalf, in force when the rate appealed against was made, was the following. -

The case set out the agreement. The following are extracts.

"An agreement made this 29th day of *March* 1852, between *The Zoological Society of London*, of the one part, and *Thomas Masters*, of" &c., "confectioner, of the other part, as follows.

"The said *Zoological Society*, for the considerations hereinafter contained, hereby agrees to grant, and the said *Thomas Masters* to take from them, the privilege of selling confectionery and other refreshments in the confectionery rooms at the gardens of the said Society in the *Regent's Park*, and such accommodation, in relation thereto, as heretofore enjoyed by him, the said *Thomas Masters*, at the said gardens, for the year commencing on the 1st day of *April* next ensuing the date hereof, and ending on the 31st day of *March* 1853. And, in consideration of such privilege, the said *Thomas Masters* agrees to pay to the said Society the sum of 400*l.*, and an additional sum of 6*l.* for every 10,000 visitors at the said gardens over and above 450,000 during the said period: the said sum of 400*l.* to be paid at the times following, that is to say: 200*l.*, part

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thereof, on or before the 31st day of *March* instant, and before the privilege hereby given to the said *Thomas Masters* shall be exercised by him; and the remaining sum of 200*l.* on or before the 1st day of *June* next; and the additional sum of 6*l.* for every 10,000 visitors" &c. "to be paid at the times following: that is to say: the first payment thereof to be made on the 1st day of the month next ensuing the day on which the aggregate number of visitors to the said gardens, computing from the said 1st day of *April* next inclusive, shall amount to the full number of 460,000; and the succeeding payments to be made on the 1st day of each month next ensuing the day on which the visitors to the said gardens shall from time to time amount in number to 10,000 complete over and above the said number of 460,000." Provisions for evidence of the number of visitors. "And the said *Thomas Masters* hereby further agrees to make the said several payments at the times and in manner aforesaid, without any deduction whatsoever; also not to assign, underlet, or in any manner dispose of, the privileges hereby granted, or any part thereof, without the previous consent in writing of the secretary of the said Society; and also not to make any alteration in or upon the said premises, or any part thereof, without the authority in writing of the secretary of the said Society authorized in that behalf by an order or minute of the council of the said Society: and, at the expiration of the said term, to remove all things belonging to him from the said gardens and premises of the said Society, and to leave the said rooms in the same condition in which they now are, reasonable use and wear only excepted. And it is hereby declared that, notwithstanding the permission

hereby given to the said *Thomas Masters* to use the said rooms, it shall be lawful for the said Society, at all times, to enter therein for any purpose, and to make any repairs or alterations as they may think fit. And it is hereby further agreed that any such alterations as shall be of a permanent character shall be made at the sole cost of the said Society; but that all such alterations and repairs as shall be of a temporary character, or shall be occasioned by, or by the neglect of, the said *Thomas Masters*, shall be made and executed at the sole cost of the said *Thomas Masters*, under the direction and by the workmen appointed by the said Society's architect." Provision enabling the Society, in case of non-payment by *Masters*, or default in the observance of any of the agreements, or of his being, by himself or servants, guilty of any misconduct in the exercise of the privileges granted, to determine the agreement by notice. "And it is hereby lastly declared that this agreement shall not operate as a demise to the said *Thomas Masters*, but merely as a right of entry upon the premises of the said Society for the purposes hereinbefore mentioned." The common seal of the Society was affixed to the agreement, which was signed and sealed by *Masters*.

One of the buildings called refreshment rooms in the above agreement is situate in the parish of *Saint Pancras*; two others are situate in *Saint Marylebone*. The first of these latter is a wooden building, about nine feet by seven at the base, and nine feet high; and it is closed by shutters and a door, and is opened by Mr. *Masters* at 9 A. M., and is locked up by him at sunset; that being the period during which the gardens are opened, and during which the right of selling mentioned in the

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agreement is exercised by him. The third is a wooden covered stall.

In the year 1851 the Society permitted Mr. *Gould* to build a room in the gardens. Mr. *Gould* exhibited therein his collection of humming birds: and he was allowed to, and did, charge for admission to view his said collection sixpence to each person (excepting fellows), in addition to the money paid to the Society by each person for entering the gardens. This continued till *October* 1851. In the following year, Mr. *Gould* allowed the humming birds to be exhibited by the Society in their gardens, without any additional charge being made to visitors to the gardens. The Society, at the end of 1851, used the materials of Mr. *Gould's* building in constructing a fresh building for exhibiting the birds in 1852. The success of Mr. *Gould's* exhibition appears by the report of the council, read on the 29th *April* 1852, which report, as well as the accompanying report of the auditors of accounts, and the report read on the 29th *April* 1851, and the auditor's accounts accompanying the same, and the report read on the 29th day of *April* 1853, and the auditor's accounts accompanying the same, may be referred to and used by either party on the argument of this case (a).

(a) Of these, parts only of the report of 1851 were referred to in the argument. They were as follows. "The characteristic increase which has had so important an effect upon the finances of the Society is however to be found in the sums contributed by the public for admission to the gardens. The sum of 10,462*l.* 9*s.* having been derived from this source presents the remarkable increase of 5810*l.* 19*s.* over the receipts of 1849, and of 6935*l.* 18*s.* 6*d.* over those of 1847, which were the smallest ever taken, while it is only exceeded by those of 1831 (11,425*l.*), which are the largest.

"As to the receipts of the current year from the 1st of *January*, notwith-

The Society occasionally sells animals and skins to the amount of several hundred pounds sterling a year. In 1850, the sales realized 724*l.* 7*s.* 6*d.*; and, in 1851, 269*l.* In 1853, the Society sold for 250*l.* a giraffe, bred in the gardens.

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The transactions and proceedings of the Society, and papers upon topics of Zoological Science, Physiology and Anatomy, illustrated, are published by the Society and sold to the public. Fellows have the privilege of receiving gratis one copy, yearly, of the proceedings, and the privilege of purchasing any number of all pub-

standing the unfavourable weather in *March*, already exceed those of the corresponding period of 1850 by 262*l.*, it is confidently hoped that the flourishing condition of the institution is now so extensively known, and public interest so thoroughly awakened in its favour, that this source of income is preserved from the adverse fluctuations which had formerly influence over it."

"The great financial success which has been already noticed as distinguishing the summer of 1850, and the consideration of the peculiar circumstances of the coming summer, confirmed the opinion of the council as to the desirableness of thoroughly developing the manifold attractions of which the garden establishment is capable.

"With this view they therefore determined on completing the great aviary which was commenced in 1848, and of which the plan had consequently been well tested by experience.

"The great attraction to visitors which is presented by the collection of carnivora, rendered some provision for their accommodation absolutely necessary on the south side of the terrace. The bank which formerly existed there has consequently been converted into two raised walks of six and eight feet in width respectively, with easy approaches and an exit at the western end. It is calculated that this improvement will admit of nearly 3000 persons standing in front of the terrace dens at one time."

"The walks throughout the garden have been put into a substantial state of repair, which was imperatively required by the immense increase of friction to which they have latterly been subjected. The principal walks have been widened; and generally, every provision has been made towards placing the establishment in a creditable and effective condition during the season which is now on the eve of commencement."

1855. transactions of the Society at a price 25 per cent. less than that charged to the public. The number of copies of the proceedings usually printed is 1000: of which number the number distributed gratis to fellows is 525, and the number purchased by fellows, which have illustration, is 148: and the number purchased by the public is 32. The number of copies of the transactions usually printed is 500: of which the number purchased by fellows is 41, and the number purchased by the public is 25: and 50 copies are given to public libraries and societies. These proceedings and transactions relate to *Zoology*, and may be referred to by either party on the argument.

The income derived from the fees, subscriptions, admissions, rents, sale of books, and all other moneys received by the Society, is applied as stated in the aforesaid printed reports (house and office expences): and those reports include, among other things, the cost of tea and coffee for the fellows and other persons present at the fortnightly evening meetings of the Society. The number of fellows who attend these meetings is usually from twenty to twenty five; and the other persons present are usually from six to eight friends of such fellows.

A band usually plays in the gardens on every *Saturday* during the months of *June*, *July* and *August*. The musicians, while performing, stand in the parish of *Saint Pancras* near the confines of the two parishes; but the company who surround them and listen to their music stand, some in *Saint Pancras* and some in *Mary-lebone*, while so listening. The expences of this band were, as appears by the auditor's report, in the year 1850 308*l.* 8*s.*; and, in 1851, 385*l.* 15*s.* No extra charge is

made for admission on those days. The Society advertises in *The Times* and other papers the days on which the band will play, in conjunction with other matter. The following is a copy of an advertisement in *The Times* of the 23d July 1851.

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"*Zoological Gardens, Regent's Park.* The Uran Utan presented by the Governor of *Singapore* is exhibited daily from 12 till 6 o'clock, together with the elephant calf and hippopotamus presented by His Highness the Viceroy of *Egypt*. The band of the 1st Life Guards will perform, by permission of Colonel *Hall*, at 4 o'clock on every *Saturday* until further notice. Admission, one shilling; on *Mondays*, sixpence." Printed placards were also placed in 1851 and 1852, in various parts of *London*, at railway stations, in omnibuses, &c., announcing that the band would play, in conjunction with other matter. The attendance of company on the days the band plays is much greater than on other days, *Monday* excepted, on which day the attendance is greatest, owing to the charge being sixpence only.

During the Summer of 1850, two *Egyptian* Arabs, who came over in charge of a collection of quadrupeds, birds and reptiles, partly a gift of *Abbas Pasha*, and partly a purchase by the Society, exhibited, in these gardens, snake charming, as practised by their tribe; which exhibition was also advertised by the Society.

About three acres of the land belonging to the Society, towards the upper part of the gardens, and not at present required for the animals, are cultivated as a flower garden, in which flowers are brought to a state of great perfection: and there are greenhouses, pits and other premises, fitted up and used for the preservation of the garden stock during the winter. The

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A GENERAL COPY OF THE CHARTER OF THE ZOOLOGICAL GARDENS OF LONDON
 A GENERAL COPY OF THE CHARTER OF THE ZOOLOGICAL GARDENS OF LONDON
 OF THE YEAR 1826 AND THE REVISION OF THE CHARTER
 AND ANNOTATE THAT IN THE SECOND GENERAL MEETING HELD
 THE 20TH DAY OF APRIL 1851 THE 20TH DAY OF APRIL 1851
 AND THE 20TH DAY OF APRIL 1851

IF THE COURT SHOULD BE OF OPINION THAT THE APPEALS
 HAVE EXHAUSTED THEIR CLAIM UNDER SECT. 6 & 7. THAT
 A 36. IS SUFFICIENT FROM INABILITY TO BE MADE THE CASE
 SHALL BE REMOVED BY STRIKING OUT THE APPROPRIATE PORTION
 OF THE APPEALS BUT IF OTHERWISE THE CASE SHALL BE
 CONTINUED.

Proving for the respondents. This Society fails to
 satisfy the principal requirements of sect. 6 & 7. That a 36.
 a 36. is a question whether it is "instituted for
 purposes of science, literature or the fine arts exclu-
 sively" at any rate the premises are not "occupied by
 it for the transactions of its business, and for carrying
 out other its purposes." Even admitting that the object
 of the incorporation as expressed in the charter, "the
 advancement of Zoology and Animal Physiology, and the
 introduction of new and curious subjects of the animal
 kingdom," is exclusively scientific, it is obvious that the
 premises are applied to purposes not scientific. The
 report of 1851 points out that the great increase of
 income has arisen from the sums contributed by the
 public for the admission to the gardens: and this is
 attributed to the improvement in respect of the objects

exhibited and of the conveniences afforded to visitors. Such an exhibition, though affording a laudable recreation, cannot be said to have an exclusively scientific purpose: similar exhibitions took place for the amusement of the populace in the *Roman* circus (a). It might as well be said that an exhibition of fireworks was made for the exclusive object of promoting the science of pyrotechny. One attraction dwelt upon is the state of the walks in the garden. Music also is resorted to as a means of attraction: and this constitutes a stronger case against the exemption than that of *Russell Institution v. Vestry of St. Giles* (b). But, further, underletting to the person who supplies refreshments is inconsistent with the occupation of the premises

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(a) The following passage in *Gibbon* was referred to, relating to the exhibition of wild animals in the *Roman* circus by the emperor *Carinus* and others. "While the populace gazed with stupid wonder on the splendid show, the naturalist might indeed observe the figure and properties of so many different species, transported from every part of the ancient world into the amphitheatre of *Rome*. But this accidental benefit, which science might derive from folly, is surely insufficient to justify such a wanton abuse of the public riches." *Decline and Fall*, ch. XII. (Vol. II. p. 100. ed. *Milman*, 1838). Counsel also read an extract from ch. IV. of the same work (vol. I. p. 162); and the following passages from *Swainson's Preliminary Discourse on the Study of Natural History*. "The constitution of *The Zoological Society* is of a very mixed nature, admirably adapted, indeed, to the reigning taste, and to uphold a very agreeable and popular establishment, suited to the rational amusement of the public. It is more calculated, however, to diffuse than to increase the actual stock of scientific knowledge. It possesses enormous funds; but it must not be forgotten, that for these funds it is largely indebted to its popular arrangements. It might perhaps combine, in a greater degree than it does, the diffusion of a taste for natural history, with the permanent object of stimulating original investigation." P. 314. "We can only hope that a larger portion of these funds, in process of time, will be devoted to the prosecution and encouragement of legitimate science than has yet been done." P. 316.

(b) *Ante*, p. 416.

1854. exclusively for scientific purposes: and on this point
 MARYLEBONE Purvis v. Traill (a) is a direct authority. Perhaps,
 Vestry after *Churchwardens of St. Ann v. Linnean Society* (b),
 v. it cannot be maintained that the contributions are not
 ZOOLOGICAL in part voluntary. [Lord Campbell C. J. The con-
 SOCIETY. tributions are not the less voluntary from the contributors
 having bound themselves to pay. But it may be worth
 considering whether that which is paid for is scientific
 improvement, or personal benefit in the nature of profit.]
 Certainly the privileges which a fellow purchases are of
 value; as, for instance, the power of giving admissions
 which must otherwise have been paid for.

Willes, contra. The general object of the Society is undoubtedly scientific. That character is not destroyed by the scientific exhibitions being rendered amusing. The resort of visitors produces no emolument to the individual members. The refreshment rooms are merely subsidiary: at scientific meetings, as, for instance, at those of The Royal Society, refreshments are provided. It is not necessary to inquire as to the effect of the exhibition of the humming birds by Mr. *Gould*, the exhibition having, before the laying of this rate, been managed merely by and for the Society. The experiments upon charming snakes are closely connected with investigations into the habits of the animal; the *Arabian* attendants upon the quadrupeds must also be serviceable in preserving the animals in a proper state, and in making known their habits. No argument in favour of the rate can be derived from the fact that the gardens are, to a certain extent, ornamentally laid out: there can be no

(a) 3 *Exch.* 344.(b) *Ante*, p. 793.

deviation from the scientific purpose in making use of land not yet wanted: the banks of railways are commonly made use of as gardens or hay fields; but it cannot be said that this alters the nature of the undertaking. [Lord *Campbell* C. J. You are, in fact, claiming to exempt from rateability these three acres, and so to burthen the parish.] If the Court thinks that the exemption is too widely claimed, the rate should be confined to so much of this land as may be considered to be in excess of the scientific purpose. The introduction of music of course constitutes an attraction: but the parties who are so attracted are not the less instructed. [Lord *Campbell* C. J. A man who goes to a play is perhaps instructed: but can it be said that the play is exhibited for the exclusive purpose of instruction?] The argument for the rate proves too much: no science is pursued without something being done which is not directly an act of scientific investigation.

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Pashley was not called on to reply.

LORD CAMPBELL C. J. I wish, at the outset, to express my opinion that the Society is deserving of the highest commendation: it has, I have no doubt, essentially contributed to the advancement of natural science; and I hope that it may long flourish. But I consider that it does not come within the statute. It tends to advance the science: but can that be said to be its exclusive object? We must exercise our judgment upon this as a matter of fact; and, doing so, I see that the Society has also another object, namely amusement, amusement of a most innocent and laudable kind, but

THE CHAIRMAN. I am talking now of the pure pursuit of science. If I were asked now to enforce the point, I should say that the contributions were not voluntary. I believe one of my learned members who sometimes looks to the members who he and his family and friends are to derive from their access to the gardens: and such subscriptions, I think to me, are not voluntary contributions to the Society within the meaning of the Act. Then we find that the gardens are not exclusively devoted to objects which, if they were the sole objects, would give the Society the character of a scientific institution, but to objects also which are not necessary or even subsidiary to the promotion of science. I am therefore of opinion that the claim to immunity is not substantiated.

EARL J. I think that this Society is not within the statutory exemption. It does promote science; and it does good by creating a predilection for science: but I cannot say that the premises are occupied exclusively for purposes of science. They are clearly occupied also for purposes which are not sufficiently proximate to that of the promotion of science to support the exemption. As to the question, whether the contributions are voluntary, we have expressed an opinion that contributions are not so where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects.

CROMPTON J. I am of the same opinion. I am glad that the purposes of the Society are not confined to such as are merely scientific: I am not sure that the additional object which is attained, that of bringing people

together for rational amusement and recreation, is not more important than the scientific object. But, as the Society is not exclusively devoted to scientific purposes, the exemption cannot be sustained.

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(No fourth Judge was present.)

Judgment for respondents, with costs.

The QUEEN *against* The Inhabitants of BURGATE. *Wednesday, May 31st.*

ON appeal against an order of two justices, removing *Ann Torbold*, widow, and her three children, aged respectively twelve, eight and six years, from the parish of *Mellis* to the parish of *Burgate*, both in *Suffolk*, the Sessions confirmed the order, subject to a case, which was, in substance, as follows.

William Torbold, the husband of the pauper *Ann Torbold*, previously to his marriage with her, acquired a settlement in the appellant parish of *Burgate*, by hiring and service for a year ending at *Old Michaelmas* 1826.

But the said *Ann Torbold* was the daughter and one of the coheiresses of *John Mullinger*, late of the parish of *Wortham* in *Suffolk*. At the time of her marriage with *W. Torbold*, which took place in *June* 1829, she resided with her father in a house of his own. He was seized in his demesne in fee simple of this house, and

M., seized in fee of land, devised it to *A.* for life, and bequeathed all his personality to *A.*, and directed that, after *A.*'s death, the land should be sold within six months, and equally divided between devisor's six children; if any of the children should be dead, the share to be equally divided between the children of such child: and executors were named; but no estate or power of sale was expressly given to them.

The devisor survived *A.*, and left two daughters, and grandchildren by another daughter, some being minors at the time of the devisor's death. The land was sold more than seven months after devisor's death; and, during the whole interval, one of the surviving daughters, with her husband, resided on the land.

Held: that a settlement was gained by such residence.

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of the premises thereunto belonging, and also of about an acre of land adjoining the same: and the whole was situate in the parish of *Wortham*. Upon the marriage of *W.* and *A. Torbold*, *W. Torbold* came to reside with his wife and her father in the house in question; and all of them continued to reside together until the death of *John Mullinger*. He died on or about 31st *August* 1844, having first made and published his last will and testament in writing, duly executed and attested for passing real estate. The following is an extract.

“I, *John Mullinger*,” “do declare this to be his last will and testament, however imperfect it may be written. Itim, I give and bequeath to my said beloved wife *Ann Mullinger* my freehold estate and all that appertain to it during her naturall life, leying in *Blow Norton* in the county of *Norfolk*. Itim, I allso give to my said beloved wife *Ann Mullinger* my other freehold estate, and all that appertain to it, leying in *Wortham* in the county of *Suffolk*, during her natural life. Itum, I allso give unto my beloved wife *Ann Mullinser* all my live and ded stock, with goods and chattels, bills and bonds, corn, wither in the barne or on the land, to do with as she please: but, providing their should not be anuff money to bury me and pay all just bills, the same shall be taking out of the said goods and chattels. Itum, after my beloved wife is deceased, the same two freehold estates shall be sold within six months, and bee equily divided betwin my six children; and providing any of them shold be ded, their farther or moother’s share to be equily divided betwin their children. Ware of i chose for my executors or executricks *Ann Mullinger*, my bloved wife, and *William Hogg*, my son in law, ware of thay shall be paid their reasonable expences.”

Ann Mullinger, the wife of the testator, predeceased him, and died in or about *January* 1842. The only descendants of the testator alive at his decease were his daughter the pauper *Ann Torbold*, his daughter *Mary Green*, since deceased, but then living, married to *Charles Green*, and his grandchildren, some of whom, at the time of the testator's death, were minors, being the lawful issue of his daughter *Susannah Hogg*, then deceased, and *William Hogg* her husband, *Susannah Hogg* having intermarried with *William Hogg* on 5th *July* 1814, and having died in *March* 1829.

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The property of the testator described in his will as his freehold estate lying in *Wortham* in *Suffolk* consisted of the house and premises and land above mentioned.

W. Torbold, and the pauper *A. Torbold*, his wife, and his family, continued to reside and sleep in the said house, and occupied the said house and premises and land from the death of the testator until the same was sold, under the provisions of the will, in *April* 1845: and, on the sale, *W. Torbold* and *Ann* his wife received one third part of the purchase money.

The pauper children are the lawful issue of the marriage of *W. Torbold* and *A. Torbold*, and are of the ages above mentioned (twelve, eight and six), and unemancipated.

W. Torbold died on or about 3d *January* 1852.

Neither *W. Torbold*, nor *A. Torbold*, his wife, nor their children, ever resided at so great a distance as ten miles from the parish of *Wortham*.

The question for the opinion of the Court of Queen's Bench is: Whether the facts stated shew a settlement of *Ann Torbold*, the widow, in the parish of *Wortham*.

I think and I think it is one of the most of Sec-
 tion. The question is whether the person who has such
 an interest under the will is a trustee for the purposes of
 Section 2 of the Act. I think that the answer
 must be that it is not. It is not a trustee. His wife
 has an interest in the property, and a life
 estate in the real estate. The Act is not applicable.
 The question is whether it is necessary to show all that in
 which the wife has a life interest. There is no
 requirement of any interest in the property. It is not
 necessary to show that the interest is a life interest.
 If the question is whether the person is a trustee, it will
 not be considered in such a case. It is not a trustee.
 If the question is whether the person is a trustee for the
 purposes of the Act, it will be considered in such a case.
 I was surprised at the result in the case at law, but
 the law is in such a position. It will be said that
 here the wife being one of two children, and at any
 rate a life estate in the property for the purposes of the will:
 and it is the fact that *Nixon, 3 P. L. 116*, 4th ed., says that
 a "material interest in the property has a beneficial inter-
 est in the estate: a mere trustee may acquire a settle-
 ment, for society can take the estate from him, and it
 is sufficient that he reside in the parish forty days, and
 cannot be removed from it." For this he cites *Rex v.*
Oakley (a); that was the case of a guardian in socage;
 but the Court clearly there considered the case distin-
 guishable from that of a trustee without interest, on the
 ground of the superintendence which the guardian was

bound to exercise over the infant's estate. In *Rex v. Stone* (a) it was held that the executor of a tenant from year to year of an estate under the value of 10*l.* might gain a settlement by residence on it: but Lord *Kenyon* seems to put the decision on the ground that the executor would hold the land though for the benefit of others: the trustee of an outstanding term could not gain a settlement: here the heirs would merely be the persons from whom the executors of the will would take the estate, and would have neither an interest entitling them to reside nor a duty requiring them to do so. The heirs could not be charged with a breach of trust. [Lord *Campbell* C. J. Suppose rent became due before sale.] The executor would distribute it among the parties entitled to the proceeds of the sale. But, further, the executors took the fee. They would have to convey a fee simple to the vendee under the will. [Lord *Campbell* C. J. Do you contend that there can be no power of sale without a legal estate in the land?] In *Shapland v. Smith* (b) (referred to in *Silvester dem. Law v. Wilson* (c)) it was held that, where trustees had to pay rates, taxes and repairs, and then pay over the surplus to *A.*, they took the legal estate. The executors here would be bound to collect the rents, till the sale. Nor is there any settlement in respect of the pauper's equitable interest. In *Regina v. St. Margaret, Leicester* (d), land was devised to a trustee, in trust to sell and divide the estate among the deviser's children, and to the separate use of such female children as should be married: and it was held that the husband of one of such children, residing on the land before sale, did not

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(a) 6 T. R. 295.

(b) 1 Br. Ch. Ca. 75.

(c) 2 T. R. 444.

(d) 2 Q. B. 559.

1854. gain a settlement; and *Rex v. Natland* (a) was there overruled. [Lord Campbell C. J. How do you collect from this will that the sale is to be made by the executors?] That appears from *Forbes v. Peacock* (b). A party entitled to the proceeds of the sale of an estate may, in general, elect to hold the land: but that cannot be so here, because the pauper was one only of persons so entitled, some of whom were minors and incapable of electing. The pauper was therefore merely a legatee of personalty. [Erle J. In the argument in *Regina v. St. Margaret, Leicester* (c), *Rex v. Wivelingham* (d) was mentioned.] The devisee in that case was capable of electing to take the land, and did elect. [Erle J. One devisee was a married woman.] That point was not brought before the Court. [Crompton J. No consent of the other devisees was necessary here: the wife was entitled to reside as heir.] It is not found that the residence was in fact in that character.

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Dasent and *H. Mills*, contra, were not called on.

LORD CAMPBELL C. J. It seems to me quite clear that there is here a legal title to the land coupled with a right to the proceeds of the sale.

ERLE J. I think a settlement was gained. As I construe the will, the legal estate descended to the pauper, with a right to reside till the power of sale should be exercised. The only case, where a pauper has been removed from land in which he has any

(a) *Burr. S. C.* 793.

(b) 11 *M. & W.* 630.

(c) 2 *Q. B.* 559.

(d) 2 *Doug.* 767.

interest, is *Regina v. St. Margaret, Leicester (a)*. Without saying more of that decision, the legal estate is here in the pauper.

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CROMPTON J. The pauper had a clear legal estate in the land, and could not be removed.

(No fourth Judge was present.)

Order of Sessions quashed.

(a) 2 Q. B. 559.

IN THE EXCHEQUER CHAMBER.

Thursday,
June 1st.

BOUGLEUX *against* SWAYNE and another.

IN this case, judgment having been given in the Court of Queen's Bench for the defendants, upon a special verdict, the plaintiff suggested error in law, which the defendants denied.

Bovill now moved that the plaintiff should give security for costs in error to the satisfaction of the Master of the Court below, and that in the meantime proceedings should be stayed. He stated the following facts (a). The plaintiff was a foreigner, resident out of the jurisdiction of the Queen's Bench, given security below for costs: and the costs incurred in that Court exceeded the amount for which security had been given.

On the application of the defendant, after denial of error, the Court of Exchequer Chamber ordered the plaintiff to give security for costs in error to the satisfaction of the master of the Court below, proceedings to be stayed in the meanwhile.

A plaintiff in the Queen's Bench, after judgment there for defendant, suggested error in the Exchequer Chamber, which defendant denied. Plaintiff resided abroad out of the jurisdiction of the English Courts. He had, by order

(a) No affidavit was used on either side, the counsel agreeing as to the facts.

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diction of the *English* Courts. He had given security for costs in the Court below, which included the costs of a former trial. The security given was to the amount of 400*l.*; but the costs amounted to 458*l.*, subject to a question which was pending on the taxation, and which might have the effect of increasing the costs. An application to the same effect had been made to *Crompton J.*, at Chambers, who was of opinion that the case was one in which he was not entitled to interfere, even if he were disposed to do so.

Bovill, in support of his motion. In *Pray v. Edie* (a), where the Court of Queen's Bench stayed proceedings till security for costs should be given by the plaintiff, who resided in *America*, the reason for granting such an application is stated by *Buller J.*: "if a verdict be given against the plaintiff he is not within the reach of our law so as to have process served upon him for the costs." The same rule was adopted by the Court of Common Pleas in *Benazech v. Bessett* (b). There, a claimant having been substituted for a defendant under an interpleader rule, *Maule J.* said: "The same mischief exists in this as in all other cases where the action is brought by a foreigner resident abroad. Unless entitled to security, the claimant, if he succeeded, would be without remedy for his costs." That applies to a case where an unsuccessful plaintiff suggests error. In *Haygarth v. Wilkinson* (c) the defendant below brought error (under the old practice), and died after joinder; and the Court of Exchequer Chamber stayed the proceedings till security for costs was given to the defendant in error, it

(a) 1 *T. R.* 267.(b) 1 *Com. B.* 313.(c) 12 *Q. B.* 851.

appearing upon affidavit that the plaintiff in error had died insolvent, and that his attorney was prosecuting the writ of error at his own risk and for his own benefit. From this it appears that the same principle, as to requiring security for costs, prevails in proceedings in error as in proceedings in Courts of original jurisdiction. And in *Lewis v. Ovens* (a) the Court of Queen's Bench ordered that the plaintiff in error, defendant below, should give security for costs, or else that the judgment might be enforced, it appearing that he resided in *Ireland*, and that the judgment below had been given on demurrer to a replication to a sham plea. The alternative there allowed would be unavailing here, because the parties on whose behalf the application is made are defendants in the Court below, where they have succeeded.

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Karslake shewed cause in the first instance. No case has occurred where the plaintiff in the Court below, bringing error, has been compelled to give security. [Pollock C. B. The application is only for security for costs.] Here security has once been given; and fresh security cannot be asked for. That was held in *Jones v. Jacobs* (b), where the sureties had become insolvent. So in *Kent v. Poole* (c) Patteson J. refused to increase the amount of security for costs, fixed by the Master, on the ground that the amount would in fact probably be larger than that fixed. Again, the application is too late. The defendants have denied the error in law, which is equivalent to having joined in error under the

(a) 5 B. & Ald. 265.

(b) 2 Dowl. P. C. 442. In the 2d line of the report there, it seems that "plaintiff" should be read for "defendant."

(c) 7 Dowl. P. C. 572.

1854. former practice. [*Jervis C. J.* I do not see how they
 BOUGLEUX could apply earlier.] There is no precedent for this
 v. application.
 SWAYNE.

JERVIS C. J. It seems to be the opinion of the Court that this application should be granted, though we have no precedent. In three or four years this decision will constitute a precedent.

POLLOCK C. B., MAULE, CRESSWELL and CROWDER
Jr., and ALDERSON, PLATT and MARTIN Bcs., concurred.
 Rule absolute.

Thursday,
June 1st.

JOHN STORM against EDWARD STIRLING.

Defendant
 signed, and
 delivered to
 plaintiff, a
 written in-

FIRST Count. That, whereas defendant, on 10th
March 1845, in parts beyond the seas, to wit at
 strument, containing the following words: "nine months after date, I promise to pay to the
 secretary for the time being of *The Indian*" &c. "*Society*, or order, Company's rupees,
 twenty thousand, with interest at the rate" &c. ; "and I hereby deposit in his hands twenty
 two *Union Bank* shares," "by way of pledge or security for the due payment of the said
 sum of Company's rupees, twenty thousand, as aforesaid; and, in default thereof, hereby
 authorize the said secretary for the time being, forthwith, either by private or public sale,
 absolutely to sell or dispose of the said twenty two *Union Bank* shares, so deposited with
 him; and out of the proceeds of sale to reimburse himself the said loan of Company's rupees,
 twenty thousand, and interest thereon, as aforesaid, he rendering to me any surplus which
 may be forthcoming from such sale. And I hereby promise and undertake to make good
 whatever, if anything, may be wanting over and above the proceeds of such sale, to make up
 the full amount of the said loan of Company's rupees, twenty thousand, and interest as
 aforesaid."

Plaintiff, at the time of the making and delivering of this paper, and thence forward
 continually till the expiration of the nine months, and ever since, had been secretary of the
Society. An action having been brought by him against defendant, after the expiration of
 the nine months, as upon a promissory note, the declaration averring the plaintiff to have
 been and to be secretary as aforesaid, and the defendant having denied making the note:

Held, that the instrument was not a promissory note, the payee being uncertain at the
 time of the making.

Quære, Whether, independently of this objection, the promise by the maker to pay in
 default of the deposit making up the sum would have prevented the instrument from being
 a promissory note?

Calcutta in the *East Indies*, made his promissory note in writing, and thereby promised to pay to the secretary for the time being of *The Indian Laudable and Mutual Assurance Society* twenty thousand Company's rupees, with interest at the rate of six per cent. per annum, nine months after the date thereof, which period and the time for payment of the said note had expired before the commencement of this suit; and then delivered the said note to the plaintiff, who, at the time of the making of the said promissory note and from thence hitherto, was and is the secretary of the said *Indian Laudable and Mutual Assurance Society*: averment that the said sum of twenty thousand Company's rupees was and is of great value, to wit of 2000*l.* of lawful &c. Breach: Non-payment.

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Plea to this: That defendant "did not make the alleged promissory note."

The plaintiff took issue on this plea. There were also other issues of fact.

On the trial, before *Crompton J.*, at the *Middlesex* sittings in *Michaelmas* Term, 1853, a special verdict was found; of which the parts now material were as follows.

As to the first issue. That the defendant, at a certain place &c. (as in the declaration), made and signed, and delivered to the plaintiff, a document in the words and figures following, that is to say:

"C. 20000.

"*Calcutta*, 10th *March*, 1845.

"Nine months after date, I promise to pay to the secretary for the time being of *The Indian Laudable and Mutual Assurance Society*, or order, Company's rupees, twenty thousand, with interest at the rate of six per cent. per annum. And I hereby deposit in his hands twenty two *Union Bank* shares, as particularized at foot,

1854. by way of pledge or security for the due payment of the
 STORM said sum of Company's rupees, twenty thousand, as
 V. aforesaid; and, in default thereof, hereby authorize the
 STIRLING. said secretary for the time being, forthwith, either by
 private or public sale, absolutely to sell or dispose of the
 said twenty two *Union Bank* shares, so deposited with
 him; and out of the proceeds of sale to reimburse
 himself the said loan of Company's rupees, twenty
 thousand, and interest thereon, as aforesaid, he rendering
 to me any surplus which may be forthcoming from such
 sale. And I hereby promise and undertake to make
 good whatever, if anything, may be wanting over and
 above the proceeds of such sale, to make up the full
 amount of the said loan of Company's rupees, twenty
 thousand, and interest as aforesaid.

"*Edw. Stirling.*"

(Then followed the numbers of the shares.)

"No. 33. Due 10/13 Dec. /45"

That *The Indian Laudable and Mutual Assurance Society*, in the said document mentioned, is *The Indian Laudable and Mutual Assurance Society* within in the declaration mentioned; and that the plaintiff, at the time of the making of the said document, and from thence until the time of the commencement of the within mentioned action, was the secretary of the said Society. That the name *Edward Stirling*, set and subscribed to the said document, is of the proper handwriting of the defendant. That the said sum of twenty thousand Company's rupees, at the time of the making of the said document, and when the same became due, was of the value of 2000*l.* of lawful money of *Great Britain*. The special verdict then left the first issue to the Court in the usual form. The findings on the other issues were immaterial to the question now decided.

The case as to the first issue was argued in last *Easter Term* (a).

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Lush, for the plaintiff. The document is a promissory note. Two objections will be made. First, it will be said that the promise to make good any sum by which the produce of the shares may fall short of the twenty thousand rupees qualifies the original promise, and destroys its character of promissory note. But such an additional engagement has not the effect suggested. In *Wise v. Charlton* (b) an instrument, which in other respects was a promissory note, contained a statement that the maker had deposited certain title deeds as an additional security for the sum which he promised to pay: and it was held that this was a promissory note on which the indorsee might sue the maker; *Patteson J.* saying that this instrument was not the less a promissory note from its being also an agreement of another kind. *Fancourt v. Thorne* (c) is to the same effect. [*Wightman J.* The promisee here was not bound to have recourse to the shares.] He was not: if that had been a necessary step, perhaps the case might have been like that of an instrument containing a promise to pay money and do another act; it seems, from *Follett v. Moore* (d), that such an instrument would not be a promissory note. The engagement is not then satisfied by the mere payment of the money. Here the promisee has an immediate unqualified right to demand the money at the end of the nine months; and the mere payment discharges

(a) May 5, 1854. Before Lord Campbell C. J., *Wightman and Crompton Js.*

(b) 4 A. & E. 786.

(c) 9 Q. B. 312.

(d) 4 Exch. 410.

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the promisor. Besides, the promise to pay the deficit is no more than the law would imply from the debt and the debt: the addition therefore goes no further than a mere recital of the fact of the deposit. There is no fresh consideration. Secondly, it will be objected that the party to whom the promise is made is not a designated individual. But the fair meaning of the undertaking is to pay to the plaintiff, described as being the secretary at the time, if he should be secretary at the maturity of the note. [Lord Campbell C. J. That might be so if the promise were simply to pay to the secretary, with the addition of the words "for the time being." I even supposing that the meaning, is an instrument void, is such a conditional promise a promissory note?] A promise to pay *S. W.* and *S. D.*, "stewardesses for the time being of *The Provident Daughters' Society*," "or their successors in office," was held, in *Rex v. Box* (a), to be rightly described, in an indictment for forgery under stat. 2 G. 2. c. 25. s. 1., as a promissory note. [Lord Campbell C. J. The persons were there designated *Crompton J.* The Court seems to have rejected the words "or their successors in office," because there could be no such successors.] The mention of the name makes no difference. In *Meggison v. Harper* (b) an instrument purported to be a "promise to pay to the trustees acting under the will of" *W. B.*; and it was treated as a promissory note. [Lord Campbell C. J. Is not this a promise to pay the person who shall be secretary at the maturity of the note?] It is payable in order: the plaintiff might have indorsed over at once [Crompton J. If he did not do so, would not the s

(a) 6 Taunt. 325.

(b) 2 Cr. & M. 322.

cessors, supposing it a promissory note, be entitled to indorse it over?] There were no such persons in existence: supposing even that the note is not negotiable at all, the action on it must have been brought by the plaintiff, even if he had quitted office. [Lord Campbell C. J. The parties clearly did not mean that.] The deposit of the shares is into the hands of the plaintiff; he, "the said secretary for the time being," is to sell the shares "so deposited with *him*." There is no uncertainty as to the payee in the sense in which the instrument in *Blanckenhagen v. Blundell* (a) was uncertain, where the promise was to pay to *J. P. D.* or to the plaintiffs. [Lord Campbell C. J. Suppose I make a written promise to pay to the person who shall be lord mayor next year.] That might not be a promissory note. [Lord Campbell C. J. The promise would be to pay to the lord mayor for the time being.] There is no uncertainty on the face of the instrument. The promise here is either to pay to the actual secretary, the plaintiff, or to a person not in being; and, on the last alternative, it is a promissory note payable to the bearer.

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Willes, contra. As to the objection last discussed. The promise is to pay to the person who shall be secretary at maturity: and the case therefore is not within stat. 3 & 4 *Ann. c. 9. s. 1.*, which includes only promises to pay to any "person or persons, body politic and corporate, his, her, or their order, or unto bearer." Independently of the statute, the action on a note would not lie, according to Lord *Holt* (b). In *Colehan v. Cooke* (c), where the particular instrument in question

(a) 2 *B. & Ald.* 417.(b) *Clerke v. Martin*, 2 *Ld. Raym.* 757.(c) *Willes*, 393. 397.

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was held to be within the statute, *Willes C. J.* exp some of the cases in which it had been held that statute was not applicable, saying: "they are a them cases where either the fund out of which payment was to be made is uncertain, or the time payment is uncertain and might or might not happen." Now here any one, not the plaintiff, might be secretary at the maturity, in which case, according to the interpretation suggested on the other side, the payment would not be made: indeed the defendant might himself become secretary. In *Meggison v. Harper* the payees were sufficiently and certainly designated by the reference to the will. In *Rex v. Box (b)* the payees were named; but there was, in addition, an attempt to give a sort of corporate succession; and this part of the note was rejected. [*Wightman J.* Suppose it appears sufficiently certain here who would be secretary when the note became due.] It is possible to conceive a case of that sort, in which the note might be within the statute: perhaps it might be so in the case of a note promising to pay "The Chamberlain of London," who is a corporation sole for some purposes, in his corporate capacity. [*Wightman J.* Suppose it payable to the secretary of the Chamberlain of London for the time being.] That would not be a good promissory note. It is suggested that the note may be treated as payable to bearer; but this is not, as in *Gibson v. Minet (c)*, the case of a fictitious payee; nor, as in *Norton v. Ellam (d)*, of no payee being mentioned. Besides, the declaration

(a) 2 Cr. & M. 322.

(b) 6 Taunt. 325.

(c) 1 H. Bl. 569., in Dom. Proc., affirming the judgment of K. in *Minet v. Gibson*, 3 T. R. 481.

(d) 2 M. & W. 461.

does not treat the note as payable to the bearer: it is not alleged that the plaintiff is the bearer; but it is alleged that he was secretary at the time of the making, and is so still: that is, the note is treated as payable to the person, whoever it might be, that should be secretary when the contract should be enforced. Next, as to the other objection. The engagement at the end of the instrument constitutes a contract which cannot pass by indorsement. It does not arise, by implication, upon the other part of the instrument. [Lord Campbell C. J. Do you contend that there cannot be a good promissory note which is not negotiable?] No. [Lord Campbell C. J. Then, setting aside the question of negotiability, what is there here which the law would not imply upon the deposit of the shares?] Suppose the note not paid for six years; and that the last share is sold after the six years have expired, but within six years of the commencement of the action, and the debt is still not fully satisfied: the statute of limitations could not be pleaded to the last contract, though it might to a promissory note. [Wightman J. If any of the shares were sold within six years of the commencement of an action on the note, might not that be set up as part payment in answer to a plea of the statute?] A payment which the payee could not help making would not be an acknowledgment, and therefore would not furnish an answer to a plea of the statute: if a note were given by way of payment, the acknowledgment would date from the giving it, not from the maturity: this is illustrated by *Waller v. Lacy* (a). The method suggested of reconciling the two engagements contained in the instrument, therefore, does not apply; and *Follett v. Moore* (b)

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(a) 1 M. & G. 54.

(b) 4 Exch. 410.

See — the law does distinguish. The instrument here contained an undertaking distinct from the fact which is said to constitute a promissory note. A promissory note cannot be treated as a separate contract. *Johnson v. Keane* 4 : 107 and see *part* if it be a contingent or conditional contract. *Johnson v. Keane* 4 : 107.

Last, in reply. The question of negotiability is immaterial, as that quality is not essential to the character of a promissory note.

Cur. adv. rest.

LORD CAMPBELL, C. J. now delivered the judgment of the Court.

It appeared, on the special verdict in this case, that the document treated in the declaration as a promissory note, and upon which the action was brought, was in the following form (his Lordship then read the instrument as set out ante, p. 533). It was found by the special verdict that the plaintiff, at the time of the making of the above document, and from thence until the commencement of the action, was the secretary of the above mentioned Society.

The only question in the case was, Whether the document in question can be treated as a promissory note. Two objections were taken to its being so treated.

First : that it was not payable to any certain person, but to the person, if any, who at the time when the note should become payable might fill the situation of secretary to the Company : and, secondly : that the additional promise to pay the deficiency in the event of a sale of the deposited bank shares prevented the instrument from being a promissory note.

(a) 2 Wils. 262.

(b) 11 A. & E. 213.

With reference to this latter objection, it was argued, on the part of the defendant, that the promise to pay the deficiency in the event of a sale after default would give a new cause of action for such deficiency, after the original cause of action had been barred by the statute of limitations; that such promise was part of an entire agreement; that it was not transferable, and prevented the instrument from being a promissory note. It was said, on the other hand, that the promise to pay the balance was no more than what the law would have implied; that there was no consideration for such additional promise; and that, even if there was such an additional promise founded on a sufficient consideration, still, as it did not qualify the promise to pay the amount of the note at the end of the nine months, and was a collateral promise with reference to the collateral security, it would not prevent the document which contained a positive promise to pay at the end of nine months from operating as a promissory note between the parties, even if it prevented it being assignable under the statute of 3 & 4 Ann. c. 9. c. 1. *Wise v. Charlton* (a) was cited, as shewing that such collateral security, not qualifying the promise to pay at the given time, did not prevent the document operating as a promissory note. And the judgment of *Patteson J.* in that case was relied on, in which he says, "This is not the less a promissory note, from its being also an agreement of another kind."

It becomes, however, unnecessary for us to decide or express any opinion on this part of the case, as we are of opinion that the first objection is fatal to the plaintiff's case.

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(a) 4 A. & E. 786.

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The nature and every definition which we find in books of a promissory note shew that it must contain an express promise to pay to a person therein named or designated, or to his order or to bearer. See *B. On Bills*, 6th edit. p. 4: *Coleman v. Cooke* (a): 2 Com. 457. If the person to whom, or to whose order it is to be paid is uncertain, and it depends on a contingency to whom, or to whose order, payment is to be made, it is not a promissory note unless it can be treated as payable to bearer.

It was urged, on behalf of the plaintiff, that we must treat this as a note made payable to the plaintiff, at the date of the document was the secretary of the Society, by his description as such secretary. And it was said that the subsequent part of the instrument, in which it is said that the plaintiff deposits in his hands and that he authorizes the said secretary for the time being forthwith to sell, points to the then secretary as the person to whom alone the promise is made, and to whom alone the note is payable.

There is no doubt, upon the authorities, that a description quite sufficient to make a note by a designation *designatio personæ* of this kind: but we do not think that we can put the above construction on the document now before us. The use of the words "for the time being" in the first instance, the repetition of them afterwards, and the whole form and scope of the instrument satisfy us that the payment was to be made to an individual who, at the time of the instrument falling due, should fill the situation of secretary of the Company, and not to the plaintiff, unless he happened

be the secretary at that time. It was, we think, clearly intended as a floating promise, the performance of which was to be made to the person being secretary when the document became due. The other construction would in effect be to hold that the words "the secretary for the time being" meant the *now* secretary: but we think that the words were used for the very purpose of excluding that construction.

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The case of *Rex v. Box (a)*, which was relied on by the plaintiff, is clearly distinguishable from the present. There the note was payable on demand to *A. B.* and *C. D.*, by name, "stewardesses" of a provident society, "or their successors in office." There the parties to whom the note was given were designated by name; and the description of them as stewardesses, which it was said they were not legally, being mere matter of description, did not alter the promise to pay them on demand: and the Judges said that, although they could have no legal successors as stewardesses, still their executors or administrators might sue. In the present case, as we read the document, the money was never to become payable to the plaintiff, and he was never to have any right upon the instrument, unless he happened to fill the situation of secretary to the Society at the end of the nine months. In *Rex v. Box (a)* the note, as construed by the Court, gave an immediate right of action to the payees named, on which they might have immediately sued; and the Court seems to have thought that the mention of the successors, who could have no legal existence, might be rejected, so that it did not destroy the immediate legal right expressly given to the

(a) 6 Taunt. 325.

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plaintiffs on demand. Here there is no right given the plaintiff, except by the words promising to pay "the secretary for the time being." It was not suggested, that case, that the note would be good if it amounted to such a floating contingent promise as we think the words are intended to import in the case before us.

It was suggested also, in the argument, that, if there were no payee who could sue, the note might be treated as payable to bearer. But we think that in so holding we should give a meaning to the note contrary to the clearly expressed intention of the maker. This is not a case of fraud, or of a fictitious payee: but the defect is that it is a promise to pay some person to be ascertained *ex post facto*; and we know no authority to shew that under such circumstances we can hold this instrument to be a note payable to bearer, because, though valid perhaps as an agreement, it cannot be enforced as a promissory note. The promise is to pay to, or to the order of, an uncertain person. But, if founded on good consideration, it may probably give rights legal or equitable to the Society. But we think that we should not be making a new instrument if we were to hold it a promissory note payable to bearer; and the case does not fall within any of the decisions cited on this branch of the argument.

As we think, therefore, that this is not a promissory note, our judgment is for the defendant.

Judgment for defendant.

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SAMUEL KERSHAW *against* ELIZA KERSHAW.Friday,
June 2d.

EJECTMENT for a messuage, tenement and appurtenances in *Lancashire*. On the trial, at the *Liverpool* Spring Assizes, 1854, before *Platt B.*, a special verdict was found, of which the material parts were as follows.

Jane Taylor, before and at the time of the making her last will and testament hereinafter mentioned, and at the time of her death, was seized in her demesne as of fee of and in the messuage and tenement, with the appurtenances, in the writ in this action mentioned. And, being so seized, she, on 28th *March* 1807, duly made and published her last will and testament in writing, duly attested and subscribed according to law, according to the tenor and effect following.

"First, I will and direct that all my just debts, funeral and testamentary charges and expences, together with the charges of the probate of this my will, shall be paid and discharged by my executors out of my personal estate. And I give out of my personal estate the following legacies or sums of money, that is to say" &c. (specifying them, none being in favour of *James Kershaw*, or his children). "And I give, devise and bequeath unto *K.*, being seised in fee, devised (by will made before 1838) to her nephew *A.*, to hold to him for his life without impeachment of waste; and, from and after his decease, to "the first son of the body of" *A.*, "to hold the same to such first son for and during the term of his natural life only, without impeachment of waste. And, from and after the decease of the last mentioned first son of the said" *A.*, "I give and devise all the said estates to the first son of the body of such last mentioned son, with remainder to the second, third and all other sons of the body of such last mentioned son, for ever, the elder being always preferred to the younger. And, in default of all such issue as aforesaid, then I will that all the said estates shall go and descend to my own right heirs for ever."

At the time of the making of the will, *A.* had two sons and two daughters. *B.*, the elder of these sons, survived *K.*, but had no children till after *K.*'s death; after which he had both sons and daughters.

Held that *B.* took only an estate for life, and could not therefore, by a disentailing deed, convey an estate for more than his own life.

That *B.*'s sons took successive estates tail in remainder, by purchase, and that, they having died without issue, or disentailing, the land went to the right heirs of *K.*

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my nephew *James Kershaw*, of *Halgh*, all my estates called &c., "and all my real estates elsew situated in the counties of *York* and *Lancaster*, or ei of them, with their appurtenances respectively, to l to him, my said nephew *James Kershaw*, for his without impeachment of waste. And, from and a his decease, I give and devise all the same estates u the first son of the body of my said nephew *Ja Kershaw*, to hold the same to such first son for : during the term of his natural life only, without : peachment of waste. And, from and after the dece of the last mentioned first son of the said *James Kersh* I give and devise all the said estates to the first son the body of such last mentioned son, with remainder the second, third and all other sons of the body of s last mentioned son, for ever, the elder being alw preferred to the younger. And, in default of all s issue as aforesaid, then I will that all the said est shall go and descend to my own right heirs for e And I will, give and order that all my silver plate s go and descend with my said real estates, according the limitations aforesaid, and be considered as l looms attending the same."

The verdict found that certain of the lands or estates in the will comprise the messuage and tenem with the appurtenances, in the writ mentioned.

That, at the time of making the said will, the *James Kershaw*, of *Halgh*, in the said will mention was a nephew of the said *Jane Taylor*, as therein n tioned; and had, at the time of making the said : four children living, namely *Mary*, *Jane*, *James* and *J* who were born in the said order; and that the nephew had had another son named *James*, who

baptised on or about 23d *February* 1800, and was the eldest son, but died an infant, of the age of about one year, several years before making the said will.

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That the said *Jane Taylor* died on 3d *April* 1807, without having revoked her said will.

That thereupon the said *James Kershaw*, the said nephew, entered upon the said messuage and tenement in the writ mentioned, and became seized of them for the estate so to him devised.

That the said *James Kershaw*, the said first mentioned son of the said nephew *James Kershaw*, survived the said testatrix; and, on 9th *November* 1825, intermarried with the defendant *Eliza Kershaw*, by whom he had only five children, who were born in the following order; namely: two twins who were born on 14th *October* 1828, and who died in a few days: one of them was a boy, and the other a girl; and neither of them was baptised: a girl, who was born on 11th *April* 1830, and who died in a few weeks; but she was baptised and named *Sarah*: a girl who was born on 6th *January* 1835, who is now living, and named *Elizabeth*: a boy who was born on 12th *February* 1846, who lived till he was between five and six years of age, who was named *James Henry*, and who died on 2d *June* 1845.

That the said *James Kershaw*, the said nephew, died on the 12th *February* 1835. That thereupon the said *James Kershaw*, the said son of the said nephew, who survived the said testatrix, entered upon the said messuage or tenement in the writ mentioned, and became seized thereof for the estate so to him devised. That on 6th *August*, 1851, the said *James Kershaw*, the said son of the said nephew, who survived the said testatrix, duly made and executed a certain deed under and in

1854. pursuance of the Act made &c. (3 & 4 *W. 4. c. 74.*,
KERSHAW “For the abolition of fines and recoveries, and for the
 v. substitution of more simple modes of assurance”); and
KERSHAW. which said deed was duly enrolled in the High Court
 of Chancery within six calendar months after the exe-
 cution thereof. Whereby he, the said *James Kershaw*,
 attempted to convey and dispose of the said messuage
 and tenement in the writ mentioned to such uses, upon
 and for such trusts and purposes, and in such manner
 and form, as he, the same *James Kershaw*, should by
 any deed or deeds appoint; and, in default of such ap-
 pointment and so far as the same should not extend, to
 the use of himself, the same *James Kershaw*, his heirs
 and assigns. And that, if he the same *James Kershaw*
 was seized of an estate tail in the said messuage or
 tenement, the same would be conveyed and disposed of
 according to the tenor and effect of the said deed.

That on 21st *May* 1852, the said *James Kershaw*, the
said son of the said nephew, who survived the said testa-
trix, duly made and published his last will and testament
in writing, duly attested and subscribed according to
law. Which will contains, amongst other things, the
following clause, namely: “I also give and devise unto
my said wife *Eliza Kershaw* the estate belonging to me
situate at” &c.; of which property the said messuage
and tenement in the said writ described formed a part.

That the said *Eliza Kershaw*, in the said last men-
tioned will named, is the defendant in the writ
mentioned.

That the said *James Kershaw*, the said son of the said
nephew, who survived the said testatrix, died on 4th
July 1853 without having revoked or altered his said
will.

That the plaintiff is the great nephew and heir at law of the said *Jane Taylor*, being the son and heir at law of *Ottiwell Kershaw*, who was the heir of the said *Jane Taylor*.

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The verdict then left to the Court, in the usual form, the question whether the plaintiff was entitled to the possession of the premises as in the writ mentioned.

The case was now argued (*a*).

Joseph Addison, for the plaintiff. *James*, the son of the nephew of the testatrix, had only a life estate, and could therefore give no estate extending beyond his own life. As he was alive at the time of the making of the will and after the death of the testatrix, a devise giving estates to his unborn son or sons as purchasers would not be bad for remoteness, he having an estate for life only. It will be argued, on the other side, that the language of the limitations over shews an intention to give him an estate of inheritance. But that view cannot be supported. First, the land is given to the nephew "for his life, without impeachment of waste." There is no pretence for treating this as a larger estate than for life. Then the land is given, "from and after his decease," to the first son of his body, "for and during the term of his natural life only, without impeachment of waste." The words here are as before, but strengthened by the addition of the word "only." This, so far, creates only an estate for life; and the question is whether such estate is enlarged into an inheritance by the devise, from and after his decease, "to the first son of the body of such last mentioned son, with remainder

(*a*) Before Lord Campbell C. J., Coleridge, Erle and Crompton Js.

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to the second, third and all other sons of the b such last mentioned son, for ever, the elder being s preferred to the younger. And, in default of all such i to the right heirs of the testatrix "for ever." The e of the sons of the nephew's son are all to be take purchase, whatever their nature is. The case is like *Foster v. Lord Romney* (a). There land was de to T. for his natural life, without impeachment of v and, from and after the determination of that estate, t use of trustees to preserve contingent remainders, from and after the decease of T., "to the use of all every the son and sons of the body of" T., "severall; successively one after another, as they and every of shall be in priority of birth and seniority of age. for default of such issue," over. It was held tha took only an estate for life. Lord *Ellenborough* (pointed out that, according to the view of Lord A field in *Denne dem. Briddon v. Page* (b), the word "s confined the meaning of issue to sons, so that the li tion was not like one made "for default of issue," w would have given an estate tail. [*Coleridge J. Evans dem. Brooke v. Astley* (c) referred to in that a ment?] It was referred to in *Denne dem. Briddo Page* (b). *Slater v. Dangerfield* (d) is also an auth for holding that the son of the nephew took only estate for life. *Monypenny v. Dering* (e) may be for the same point; although it may be admitted the discussion in that case was mainly on the cy

(a) 11 *East*, 594.

(b) 11 *East*, 603, note (b); S. C., as *Denn dem. Bridden v. Page*, ne to *Doe dem. Dacre v. Dacre*, 1 B. & P. 261.

(c) 3 *Burr.* 1570.

(d) 15 *M. & W.* 263

(e) 2 *De G. Macn. & G.* 145., affirming the judgments of *Wigram* in S. C. 7 *Hare*, 568, and of *K. Bruce* V. C. in S. C. See S. C. & *W.* 418, 9 *Com. B.* 700.

doctrine. [*Cowling*, for the defendant, agreed to this.] But, on the other side, it will be contended, further, that, even supposing this to be so, and his deed to be ineffective, still the plaintiff cannot recover, because the limitations following the gift of such estate for life give fees to the sons of the son of the nephew. Now, if they give only estates for life or in tail, the plaintiff must succeed, the sons having died without issue, and not having disentailed. But, to shew a fee simple, the plaintiff will rely on the words "for ever." Whatever be the effect of these words, no more than an estate tail can arise. For, if the words gave a fee, that fee would go, in the first instance, to the eldest son of the nephew's son; and thus the intention of the testatrix, that the sons of the nephew's son should have estates successively in remainder one after the other, would be defeated; such eldest son might devise the whole away; if he did not, his daughters would take before his brothers. But, supposing the words "for ever," alone, would give the fee, then such estate is cut down to an estate tail by the words "in default of all such issue;" *Lewis dem. Ormond v. Waters* (a). [*Coleridge J.* Are you not now, for the purpose of cutting down the estate given to the sons of the nephew's son, seeking to give an effect to the words which you will not allow to them for the purpose of enlarging the estate of the nephew's son?] "Issue" means the issue of the nephew's son, not the issue of the nephew's son's sons: the argument therefore may consistently be applied to one case and not to the other. Where an estate is expressly limited for life only, it never is enlarged into an estate tail except where that is

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(a) 6 *East*, 336.

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the only possible mode of giving effect to the limitation in remainder. But words which, of themselves inheritances may be restricted to estates tail by which, as here, give the land over to heirs general the failure of the donees, described as sons of the testator and taking successively in remainder. [*Coleridge* In *Lewis dem. Ormond v. Waters* (a) the words "want of such issue" followed the limitation "to the said son and other sons of my said eldest son and their heirs." Upon the assumption which the defendant must make here, the words "for ever" are tantamount to words of inheritance: if they are not, the estates are only fee simple and the difficulty which is suggested against the testator's claim does not arise. The object of the testator was to defer to as late a time as possible the possibility of absolutely aliening the land: this general intent was carried out by the construction for which the plaintiff contends, without violating the intention apparent in any particular limitation.

Cowling, contra. The nephew's son took an estate tail male: and a remainder over is limited in the event of the failure of such estate. The words "for ever" and "in default of all such issue" shew that the testatrix meant to give some inheritable estate to some person. The question therefore is, Who is the root of this inheritable estate? If the son of the nephew be taken as the root, the intention of the testatrix will be carried out nearly as can be done consistently with her language. It is to be observed that the disposition made of the land after the death of the nephew is very different from that made after the death of his son. After the death of the nephew, no interest is given to any

(a) 6 *East*, 336.

of the nephew except *James*, the elder : his second son, *John*, is completely excluded, as well as his daughters. Had *James*, the nephew's eldest son, not taken, the land would have gone to the right heirs of the testatrix. But, at the death of the son of the nephew, the land goes to his sons in succession, according to priority of birth, for ever. Here "sons" seems to be used as nomen collectivum: and, when the sons are exhausted, the land is to go, not to the daughters, but to the right heirs of the testatrix. That is, in effect, a tail male in the nephew's eldest son. [Lord *Campbell* C. J. Would not the intention of the testatrix be fully carried out by making the son of the nephew's son the root of the inheritable estate?] No construction will quite carry out the intention. The word "only," following the limitation for life to the nephew's son, will not affect the estate resulting legally from the limitations, any more than if the testatrix had given a fee with a proviso against alienation, in which case the proviso would have been rejected (a). It does, however, shew that the testatrix believed that, but for the word "only," the limitations would have given more than a life estate. In *Robinson v. Robinson* (b) land was devised to a man "during the term of his natural life, and no longer;" yet, because the limitation required an estate tail, the words "no longer" were rejected. There the limitations over were: "after his decease, to such son as he shall have:" "and for default of such issue" then over. In *King v. Melling* (c) Lord *Hale*, delivering judgment, cites *Bifield's Case* (d): "a devise to A. and if he dies not having a son, then to remain to the heirs of the testator. Son was there taken

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(a) See *Litt. s.* 360; *Co. Litt.* 223. a.(b) 1 *Burr.* 38. Affirmed in *Dom. Proc.* under the name of *Robinson v. Hicks*, 3 *Bro. P. C.* 180 (2d ed.).(c) 1 *Vent.* 225.(d) 1 *Vent.* 231.

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to be used as nomen collectivum, and held an entail." the failure of issue looked to is the failure of the issue of the son of the nephew; that son therefore is the root of the entail. If his sons take by purchase, what estate do they take? There is nothing to make it an estate tail male, rather than in tail general: yet it is manifest that the testatrix meant to give the inheritance to no one but her son only. In *Wight v. Leigh* (a) the devise was to the plaintiff, and after his death to his first and other sons and in default of male issue to his eldest son and daughters and their heirs male for ever: this was held to be a tail male in the plaintiff; Sir W. Grant M. R. saying: "The male issue intended must, I think, be the male issue of the father, not of the sons. Nothing is before mentioned of any issue male of the son, whereas there is a certain description of male issue of the father before spoken of, viz. his first and other sons. Therefore the failure of issue male intended must be the failure of issue male of the father, rather than of the sons." The same reasoning shews that here the root of the entail is the nephew's son; for there can be no difference between "default of male issue" and "default of issue;" "such" must refer to what has been before described, as appears from *Goodright dem. Dockin dem. Dunham* (b). The will here appears to use a peculiar vocabulary. If a testator devised to A. for life, remainder to A.'s son for life, remainder to such son's son for life, and so on for ever, that would be a tail male as much as if the words "tail male" had been used; and if to that had been added a clause that no one tenant in possession should bar the estate, such clause would have been rejected. [*Crompton J.* The object here was to prevent the barring as long as possible.]

(a) 15 Ves. 564. See *Doe dem. Burris v. Charlton*, 1 M. & G. 4

(b) 1 Doug. 264.

Neither construction aids that. If the unborn sons of the nephew's son were to take by purchase, it would be a contingent remainder, which the tenant for life might defeat. [Lord Campbell C. J. It is not likely that the testatrix knew that.] In *Foster v. Lord Romney* (a) the words "for ever" did not occur. The propriety of the decision in *Wight v. Leigh* (b) has been doubted in 2 *Jarman On Wills*, 387 &c. The author seems to consider that sufficient stress was not laid on the words "Surrey estate," which would, he says, have of themselves vested the fee in the sons, so that the words "in default of male issue" might have been applied to cutting down such fee to an estate tail, so as to enable them to take in succession. But a similar expression occurred in *Foster v. Lord Romney* (a), and was not treated as giving a fee. *Slater v. Dangerfield* (c) is inapplicable: there the devise was to D. for life, and then to the lawful issue of D., their heirs and assigns for ever: a party could not well be said to take to himself and heirs except by purchase. *Doe dem. Blandford v. Applin* (d), *Chorlton v. Craven* (e), *Lewis v. Puxley* (g), supply instances where, to effectuate the general intent, estates expressly limited for life have been enlarged into inheritances.

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Joseph Addison, in reply. The argument, that no stress is to be laid upon the apparent intention of the testatrix to tie up the estate as long as possible inasmuch as the particular tenant could destroy the contingent remainder, is hardly applicable to such a will as this. The testatrix might well know that a tenant in tail could bar the entail by recovery, but might not

(a) 11 *East*, 594.(b) 15 *Ves.* 564.(c) 15 *M. & W.* 263.(d) 4 *T. R.* 82.(e) Cited in *Mellish v. Mellish*, 2 *B. & C.* 524.(g) 16 *M. & W.* 733.

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know that by a tortious act the contingent remainder would fail for want of a freehold to support it. The legal results of the two acts are very different. In the cases in which an estate expressly given for life has been enlarged into an inheritance, the object has been to carry out the general intention: here such a construction would defeat the general intention. *Good dem. Docking v. Dunham* (a) is an authority in favour of the plaintiff: the first taker there was held to have taken an estate for life. Mr. *Jarman* considers that *Edm. Brooke v. Astley* (b) is overruled by *Foster v. I. Romney* (c); *Jarman On Wills*, vol. 2. p. 369. The intention here that the sons shall take in succession is of great importance: on that point the decision in *Lewis dem. Ormond v. Waters* (d) mainly turned, as pointed out by Lord *Ellenborough* in *Rex v. The Mary of Stafford* (e).

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Lord CAMPBELL C. J., on a later day in this Term (June 8th), delivered the opinion of the Court.

In this case we are of opinion that the plaintiff is entitled to recover.

The only question is, What estate was taken, under the will of *Jane Taylor*, by *James Kershaw*, the son of *James Kershaw* the nephew of the testatrix? We think that he took only an estate for life. Such an estate was expressly limited to him by the words following: "I devise for life to the nephew, "and, from and after my decease, I give and devise all the same estates unto the first son of the body of my said nephew *James Kershaw* to hold the same to such first son for and during

(a) 1 *Doug.* 264.

(b) 3 *Burr.* 1570.

(c) 11 *East*, 594.

(d) 6 *East*, 336.

(e) 7 *East*, 521. 528.

term of *his natural life only*, without impeachment of waste." Still this estate for life might be enlarged into an estate tail, if there were any general intent expressed by the testatrix which, without doing so, could not be carried into effect. Her intent appears to have been that the sons of *James* the son should successively take estates tail, and that her right heirs should take only when these estates tail were exhausted. But this purpose will be carried into effect, *James* the son taking only an estate for life, and his eldest son taking an estate tail by purchase. Without the estate of *James* the son being enlarged so as to make him the stirps from whom his sons were to take by descent, the words which follow the limitation to him we consider quite sufficient to accomplish the intention of the testatrix: "and, from and after the decease of the last mentioned first son of the said *James Kershaw*, I give and devise all the said estates to the first son of the body of such last mentioned son, *with remainder* to the second, third and all other sons of the body of such last mentioned son, *for ever*, the elder being always preferred to the younger. *And, in default of all such issue as aforesaid*, then I will that all the said estates shall go and descend to my own right heirs for ever." Bearing in mind that *James* the son of the nephew was born when the will was made, not only does the intent of the testatrix seem manifest, but she uses apt language to carry it into effect, after giving *James* the son an estate for his natural life only. Without express words of inheritance in the limitation to his sons, it seems clear that, taking by purchase, they would take more than life estates, viz. estates tail successively. The several expressions, "with remainder," "for ever," and "in default of all such issue

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as aforesaid," we think are abundantly sufficient to indicate an intention to that effect. If the ultimate limitation in fee had been to a stranger, instead of being to the right heirs of the testatrix, it would have taken effect upon the death of *James* the son without issue, or upon the failure of the estates tail given to his sons: but this is quite compatible with *James* the son taking an estate for life only.

Mr. *Cowling* contended that this construction of the will would defeat the intention of the testatrix by taking in females, as, if the sons of *James* the son take estates tail by purchase, they must be estates in tail general; whereas, he says, she manifests a desire to exclude females from the succession. If such an intention be clear, the estates tail taken by the sons may be construed to be estates in tail male. But we cannot discover any such manifest intention; nor do we see how it would be better carried into effect by giving an estate tail to *James* the son. This would be in direct violation of the language she has employed, and would entirely defeat the intention she manifests, by her will, to keep the lands devised inalienable as long as she could in the lifetime of the *Kershaws* by exercising the power which she has to give an estate for life only to the son of her nephew. His disentailing deed and his will therefore operate for nothing: and the plaintiff is entitled to recover as the heir at law of the testatrix.

We do not consider it necessary to comment upon the cases cited in the argument; for none of them conflict with our decision; and they only lay down the well known general rules by which we have been guided in giving judgment for the plaintiff.

Judgment for the plaintiff.

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The QUEEN *against* FREDERICK DAY.*Saturday,*
June 3d.

T. C. FOSTER, in *Michaelmas* term, 1852, obtained a rule, calling on *Frederick Day* to shew cause why an information in the nature of Quo warranto should not issue against him at the relation of *Edward Pope*, for the office of coroner for the *Hemel Hempsted* district of the county of *Hertford*. In *Easter* Term, 1853, *Lush* shewed cause, when it appeared that the facts were not in dispute.

It was agreed, on both sides, that an election for coroner was duly held in *June* 1852; that *Day* and *Pope* were the candidates; that *Day* had a majority of votes actually received, and was declared elected, and had acted; that the votes of *James Raggett*, and a number of other persons claiming by a similar qualification, were objected to on behalf of *Pope*, but received for *Day*; and that, if these votes were struck off, *Pope* had the majority. The Court ordered that the facts relating to *Raggett's* qualification should be stated in a case, which was now argued.

The case, after stating the election, and that stat. 49 G. 3. c. clxix. (a) was to be taken as part of the case, proceeded

By a local statute, land was vested in trustees in fee, in trust for the benefit of the inhabitants of the parish of *H.*, subject to by-laws which the trustees were empowered to make. The trustees were empowered to let the land; and to regulate the right of pasture, on the portion not let, to be enjoyed by the inhabitants of the parish of *H.*, householders at the time of the passing of the Act. The right of pasture of each such householder at the time of the Act was assignable to any others being inhabitants.

At an election for coroner for a district comprehending the parish of *H.* and the land in question, the votes of inhabitants of the parish entitled, as assignees, to pasture over the land in question were received for the candidate who was returned.

On a quo warranto against him,

Held: that the qualification for a voter for coroner is the possession of a legal freehold: that these inhabitants had, at most, only an equitable interest in the land; and that their legal interest was, at most, a right to common in gross, which confers no vote. Judgment for the Crown.

(a) Local and personal. "For vesting in trustees a certain tract of open pasture land called *Box Moor*, in the parish of *Hemel Hempsted* in the county of *Hertford*, upon certain trusts, applying the produce thereof,

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as follows. The tract of pasture land called *Box Moor* and other the hereditaments and premises in the sa

and for better securing the rights of the respective parties entitled to t
 said Moor."

Sect. 1 recited successive deeds of feoffment: the first dated 26th Apr 36 Eliz., whereby certain lands now known as *Box Moor*, and rights fishing in the streams flowing there through, were conveyed to feoffees in trust for the inhabitants of *Hemel Hempsted* and *Bovingdon*; and th last a deed of feoffment in trust, dated 20th April 1787; the trusts wer declared to be, in trust "for the feoffees therein before named, and a other person and persons whomsoever, by whatever name or names soevr they be called or known, which then dwelt and were inhabitants of *Hem Hempsted* and *Bovingdon* aforesaid and their respective heirs, by equ portions thereof in common, so long as they or every or each of them, c their heirs, should dwell and be inhabitants of *Hemel Hempsted* o *Bovingdon* aforesaid; and if they or any of them, or the heirs of them should depart, remove and not dwell there, then, in trust for such othe person or persons, and their respective heirs, for such portion or portio of him or them so departing, removing, and not dwelling, there in commo with the rest then inhabiting there, as should successively in their place and steads so departing and removing, there dwelling and be inhabitant of *Hemel Hempsted* and *Bovingdon*, so long as such person or persons an their heirs should so dwell and be inhabitants in their places and stead aforesaid, and so from time to time after every departing or removing t dwell in *Hemel Hempsted* and *Bovingdon*." The section then recited deed poll of 14th September 1799, by which the feoffees conveyed part c the land to *The Grand Junction Canal Company*, and some other deeds c sale, to other parties named in the Act, of other parcels; and, after furthe reciting that doubts had arisen as to the validity of these conveyances, an that it was desirable to empower the trustees to make by-laws, it wa enacted that the premises should be vested in certain persons named a trustees, their heirs and assigns, "to the use of them, their heirs an assigns for ever, for the best use and advantage of the inhabitants of *Hem Hempsted* and *Bovingdon* aforesaid, in manner mentioned in the sai several recited indentures of release and feoffment, and upon the trust and to and for the intents and purposes hereinafter expressed and declare of and concerning the same."

Sects. 2, 3, 4 and 5 confirmed the various sales of parts of the premise recited in sect. 1. Sect. 7 enacted that the trustees should hold th premises "in trust for, and for the best use and advantage of the inha bitants" of *Hemel Hempsted* and *Bovingdon*, subject to by laws to be from time to time made by the trustees. Sect. 9 empowered the trustees to le

Act mentioned, are freehold, and situate partly in the parish of *Hemel Hempsted* aforesaid, and partly in the hamlet of *Bovingdon*, but entirely within the said district for which the said election took place. From the passing of the said Act, up to and at the time of the said election, such parts of the said pasture land as were not demised or leased according to the provisions of the said Act were, subject to the provisions of the said Act, and in pursuance of the regulations and stints in that behalf, from time to time made by the trustees for the time being acting under and by virtue of the said Act, used and enjoyed for purposes of pasturage by such of the inhabitants of the parish of *Hemel Hempsted* and hamlet of *Bovingdon* aforesaid as were, for the time being, householders of the same parish and hamlet of certain whole tenements situate therein, which were either standing at the time of the passing of the said Act, or had been erected on the sites of such tenements as were so standing, and which said tenements were, before and at the time of the said election, and are now, identifiable by iron labels or tickets fixed to them. The value of such pasturage to each of such inhabitants was, before and at the time of the said election, about 6s. a year. During all the time aforesaid, the rivers *Gade* and *Bulbourn*, in the said Act mentioned, and running through and covering several acres of the said moor, were, subject to and according to the provisions in that

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any part of the moor. Sect. 12 authorized them "to regulate and stint the quantity of cattle to be turned on such parts of the moor as shall be left remaining for pasture, by each inhabitant at the time of passing this Act, being a householder of the said parish or hamlet of a whole tenement, in respect of such tenement." Sect. 13 rendered such right of pasture transferable from time to time to any other person being such inhabitant householder.

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behalf of the said Act, used and enjoyed for the purpose of fishing, and taking of fish therein, by such inhabitant householders for the time being of the said parish and hamlet as aforesaid. Subject to such user and enjoyment of pasturage, and of fishing and taking of fish, aforesaid, the rents, issues and profits of the said moor and of the wharf, and other the hereditaments and premises in the said Act mentioned, were, from the time of the passing of the said Act up to and at the time of the said election, received by the trustees for the time being, acting under and by virtue of the said Act, and have been by such trustees, annually from time to time during all that time, applied and divided, as to the fourth parts thereof to and for the use and advantage of the inhabitant householders for the time being of the said parish of *Hemel Hempsted*, and as to the remaining one fourth part thereof to and for the use and advantage of the inhabitant householders for the time being of the said hamlet of *Bovingdon* aforesaid.

Before and at the time of the said election, the said *James Raggett* was an inhabitant of the said parish of *Hemel Hempsted*, and a householder of the same parish of a whole tenement situate therein, being one of the said tenements the householders whereof so used and enjoyed the said moor for the purposes of pasturage, aforesaid, and the said rivers for the purposes of fishing and taking fish, as aforesaid, and was, at the time of the said election, in the actual use and enjoyment of such right of pasture and fishing respectively, and to the other benefits and advantages of the said Act. The said *James Raggett* had not at the time of the said election any right or title to vote at the same election, except hereinbefore set forth, or referred to.

The question for the opinion of the Court is: Wheth

the said *James Raggett* was entitled to vote at the said election. If the Court shall be of opinion in the affirmative thereof, then the said *Edward Pope* agrees that no further proceedings herein shall be taken; but, if the Court shall be of a contrary opinion, then the said *Frederick Day* agrees that judgment of ouster shall be forthwith signed against him: and it is hereby agreed that neither party shall seek costs against the other in either event.

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T. C. Foster, for the Crown. The qualification of a voter for coroner is, that he shall have a legal freehold. "It is to be known, that the office of a coroner ever was, and yet is eligible in full county by the freeholders, by the King's writ *De coronatore eligendo*: and the reason thereof was, for that both the King and the county had a great interest and benefit in the due execution of his office, and therefore the common law gave the freeholders of the county to be electors of him." 2 *Inst.* 174. All the authorities agree that this was the common law. At common law knights of the shire, coroners and verderers were all to be chosen by the freeholders of the county; *Dalton on Sheriffs*, 443. c. 114. The same law, as to coroners, is laid down in 3 *Hawk. Pleas of the Crown*, 103. (B. II. c. 9. s. 10.), and 1 *Bl. Com.* 347. Stat. 8 *H.* 6. c. 7. took away the right of voting for knights of the shire from those whose freeholds were under 40s.: the qualification of a voter for coroner was untouched by that Act. The freeholders must mean the legal freeholders, those who had a right to be in the full county court. Then came stat. 7 & 8 *W.* 3. c. 25. s. 7., which took away the franchise for electors of knights of the shire from trustees, not in possession, and

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conferred it on the cestui que trust in possession. S 58 G. 3. c. 95. s. 2. contains a precisely similar provision as to the election of coroner. But stat. 7 & 8 Vict. c. repeals stat. 58 G. 3. c. 95. absolutely, and, by sect. enacts that the coroner for a district "shall be chosen by a majority of such persons residing within such district as shall at the time of such election be duly qualified to vote at the elections of coroners for the said county." As stat. 58 G. 3. c. 95. is repealed, this section must be understood to mean those duly qualified at common law to vote, and that, as already shewn, means those who have legal freeholds. Now in the present case it is clear that *Raggett* has no legal interest in *B. Moor*. The legal estate is in the trustees, who have power to let the land. It may be doubted whether the inhabitants of *Hemel Hempsted* have any legal interest at all; but at most it is only a right of common in groves. But "He which hath no other freehold than common of pasture, though that be to the value of 40s. per annum, yet he may be no chooser: But he which hath a freehold house or lands, of the yearly value of 30 and besides hath thereto belonging a common of pasture appendant, to the yearly value of 20s. he may be chooser, &c. Otherwise it is, if his house be a newly erected tenement, or erected within the time of memory; for that common appendant must be by prescription; and therefore except such house be of the yearly value of 40s. besides the common, it enableth him not." *Dalton on Sheriffs*, 333. ch. 92. That is said of the franchise of voters for knights of the shire. The value of the freehold is not material, as to the franchise for coroners; but the freehold must be of the same nature as that which, if worth 40s., would qualify to vote for

the knights of the shire. And the right of fishing, also, is not a several fishery, but at most common of piscary in gross. Further, supposing that an equitable freehold qualified an elector, the inhabitants have not got equitable freeholds. The trustees may alter the by-laws; so that the interest of the inhabitants is not freehold; *Davis v. Waddington* (a).

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Lush, contra. First, the interest of *Raggett* is a freehold. The definition of a freehold in *Co. Litt.* 42. a. is familiar. "If a man grant an estate to a woman dum sola fuit," "or as long as the grantee dwell in such a house," "or for any like uncertain time, which time, as *Bracton* saith, is *tempus indeterminatum*: in all these cases" "the lessee hath in judgment of law an estate for life determinable." So that the possibility that, by an alteration in the by-laws the interest of *Raggett* may, at some uncertain time, cease, does not affect the question. The power to alter the by-laws is not arbitrary, and therefore does not make this a holding at will; *Beeson v. Burton* (b). The rights of the inhabitants in the present case are assignable, under sect. 13 (c), which is strong to shew that they are not precarious. Part of these rights at least are legal. The right of common in gross is a tenement; *Rex v. Dersingham* (d). It is said in the passage referred to from *Dalton on Sheriffs*, 333. ch. 92., that common in gross gives no vote: but no authority is cited for this; and in the same passage he says that common appendant or appurtenant is to be taken into account, which is inconsistent. [Lord Campbell C. J. The distinction which *Dalton* takes is intelligible.

(a) 7 M. & G. 37.

(b) 12 Com. B. 647.

(c) Ante, p. 859, note (a).

(d) 7 T. R. 671.

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Where common is appendant there is a substratum it were, of freehold, to which it is attached; and enhances the value of that. Where it is in gross, it is no such freehold at all. I give no opinion as the distinction being sufficient; but it is intelligible. A commoner who is disseised may have an assize. *Com. Dig. Common* (I). [Lord Campbell C. J. It cannot be the test of freehold or not, for this purpose. An assize lay for an office.] Then an equitable freehold gave a vote at common law. [Coleridge] How could a cestui que trust appear in the common law court? Besides, there is nothing at common law to prevent the trustee from voting; so that, according to you, there might at common law have been two freeholders voting on one qualification.]

T. C. Foster was heard in reply.

LORD CAMPBELL C. J. I am of opinion that *Raggs* had no right to vote. It is clear that the right to vote for coroner now depends on the common law; for statute 58 G. 3. c. 95. has been repealed, and so the common law restored. We have therefore to inquire what was at common law, the right to vote for knights of the shire and coroner; for it was the same. And that right was confined to those who were freeholders; that is, to those who possessed a legal estate of freehold; and so it continued down to statute 7 & 8 W. 3. c. 25. s. 7., which affected the voters for knights of the shire only, statute 58 G. 3. c. 95. s. 2., which enacted that no person shall be allowed to vote for coroner "for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of such estate; but that the mortgagor

cestui que trust in possession shall and may vote for the same estate, notwithstanding such mortgage or trust."

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But this enactment is repealed, and the common law as to voters for coroner restored. Now, in the present case, the legal right of *Raggett*, at the very most, was no higher than common in gross. We have the high authority of *Dalton*, that common in gross gives no vote for a knight of the shire; and, if so, it gives none for coroner.

COLERIDGE J. Stat. 58 G. 3. c. 95. is repealed. If we looked at the language of that Act alone, I think the conclusion would be that it for the first time created a franchise in the cestui que trust in possession, which did not previously exist; and that it, for the first time, enforced a restriction on the right to vote of him who had the legal estate but not the equitable estate in possession, whose qualification was taken away and transferred to the cestui que trust: and, if we look at the common law authorities before the Act, this is confirmed. In this case the legal right of *Raggett*, supposing it to amount to common in gross, gives no vote. For that we have the authority of *Dalton*.

ERLE J. I agree that it is not established that *Raggett* had a right to vote. His legal claim is at most common in gross, which, according to *Dalton*, gives no vote. If he had an equitable freehold, it would not, I think, give him a right to vote; but I think he makes out nothing higher than an equitable interest held at discretion.

(CROMPTON J. had left the Court.)

Judgment for the Crown.

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*Tuesday,
June 6th.*

AUGUSTUS SILLEM, DREDRICH HEINRICH GADE-
CHENS, and FREDERICK DOENIG, *against*
RICHARD THORNTON.

By a policy executed in London, on 7th April 1851, premises in California were insured against fire for a year from 1st February 1851. The premises were described in the policy as "a brick building used as a dwelling house and store (described in the paper attached to this policy)." The paper attached gave a minute description of a two storied house, with what purported to be a certificate that the description was accurate, signed on 30th October, 1850. The description was, in fact, accurate up to March, 1851; in which month the assured altered the house by adding a third story. This was unknown in London when the policy was signed. In May, 1851, the house, thus altered, was destroyed by fire. In an action on the policy, on a case stating the above facts:

Held, that the description in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from that description, so as to increase the liability of the assurer: that this warranty was broken; and, consequently, that the plaintiffs could not recover.

ASSUMPSIT (a) against an underwriter for 1600*l.*, on a policy of assurance against loss by fire, for a year, from 1st February 1851, to 1st February 1852, on "a brick building, used as a dwelling house and store, described in a paper attached to that policy," situate at San Francisco, valued at 4,000*l.*, payable within thirty days after proof of loss. Averment of a total loss by fire, and that thirty days had elapsed after proof thereof. Breach: Non payment.

Pleas. 1. Non Assumpsit. Issue thereon. 2. Denial of the loss: conclusion to the country. Issue thereon. 3. Denial of the lapse of thirty days: conclusion to the country. Issue thereon. 4. That, after the making of the policy, and before the loss, plaintiffs, without the knowledge or consent of defendant, materially altered the premises, so as thereby to vary and increase the risk: verification. 5. That, by the paper attached to the policy, plaintiffs warranted that the building was &c. (the plea then set out the description): that defendant

(a) The issue was complete before The Common Law Procedure Act, 1852, came into operation.

subscribed the policy, confiding in that warranty: that the building did not answer that description, either at the time of the making the policy, or at the commencement of the risk on 1st *February* 1851: verification.

6. That the policy was obtained by misrepresentations, and concealments of facts known to plaintiffs, material to the risk and the amount of premium: verification.

Replications to 4th, 5th and 6th pleas: *De injuriâ*. Issues thereon.

On the trial, before Lord *Campbell* C. J., at the *London* Sittings after last *Trinity* Term, the verdict passed for the plaintiffs, subject to the following case.

The plaintiffs are the agents of Messrs. *Godeffroy, Sillem & Co.*, who are merchants, at *San Francisco* in *California*. The defendant is an underwriter in the City of *London*. Messrs. *Godeffroy, Sillem & Co.* were, from the month of *October* 1850, to the time of the fire hereinafter mentioned, the owners of a brick building, used as a dwelling house and store, situate at the corner of *Clay* and *Leidesdorff* Streets at *San Francisco* in *California*, built in *September* 1850. In the month of *October* 1850, being desirous to effect an insurance against fire upon the building, they transmitted to their agents a description of the building, as it then stood, being the description hereinafter mentioned as annexed to the policy of insurance effected with the defendant. The cost of the original building, so described, was 6000*l.*; it was valued in the policy at 4000*l.* In *March* 1851, Messrs. *Godeffroy, Sillem & Co.* were desirous to erect a third story to the building. They commenced doing so on the 26th of *March*, 1851; and, between that date and the time of the fire hereinafter mentioned, the following alterations and additions were made. The

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walls of the original building were carried up to the third story, and the roof put upon that story, the walls being carried up in all to the height of 13 feet which 3 feet were above the new roof. The new walls were $12\frac{1}{2}$ inches thick; the new roof was not covered with zinc or other metal; it was composed of a layer of brick, a layer of cement, and then another layer of cement. The original building remained, the roof being flat and not having been interfered with; but the reservoir on the 2d of May 1851, taken from the top of the old roof, and placed upon the top of the new roof, that being necessary in order to allow of the completion of improvements in the interior of the additional story. Such removal was intended to be permanent, and to be made to communicate with the requisite pipes. When the reservoir was so removed, four hogsheds of water communicating with the water pipe so that they could be refilled as often as necessary, and containing 100 gallons, were placed on the old roof which had become the floor of the additional story. In addition to this, the old roof could be flooded with water by means of a pipe connected with the pump. The reservoir, at the time when placed on the new roof, up to and at the time of the fire, had a foot of water in it. There was a feed pipe attached to it, and no communication with the force pump, or other means of filling it with water adapted to it. There was no pipe on the new roof, nor holes in it, or other means capable of maintaining a constant or any stream of water over such roof. There were there any means of supplying water to such roof except by buckets. There were four openings in the new story: shutters of iron had been ordered for them, but had not been sent home; and

had no shutters of any sort up to or at the time of the fire. During the fire, these holes were stopped up with wet blankets. These works cost 1000*l*. They are to be taken as not having increased the hazard or probability of fire, except so far (if at all) as the increase of the area of a building by a third story may be considered by the Court to have necessarily increased such hazard or probability. On the 7th *April*, 1851, the plaintiffs, as agents for the said Messrs. *Godeffroy, Sillem & Co.*, effected with the defendant a policy of insurance for 1600*l*., as follows. "In the name of God Amen. Whereas Messrs. *Herman, Sillem, Son & Co.* merchants, *London*, have paid six guineas per cent. premium or consideration to us who have hereunto subscribed our names, to insure from loss or damage by fire a brick building used as a dwelling house and store (described in the paper attached to this policy); situated at the corner of *Clay* and *Leidesdorff* Streets at *San Francisco* in *California*, and belonging to Messrs. *Godeffroy, Sillem & Co.* of *San Francisco*, valued at 4000*l*. sterling, from noon on the 1st day of *February*, 1851, to the 1st day of *February*, 1852, at noon: Now know ye that we, the insurers, do hereby bind ourselves, each for his own part, and not one for another, our heirs, executors and administrators, to pay to the said *Herman, Sillem, Son & Co.*, executors, administrators and assigns, all such damage and loss by fire not exceeding the sum of within thirty days after such loss is proved, and that in proportion to the several sums by each of us subscribed against our respective names, without any deduction whatsoever, or any allowance for average or charge on what may be saved, unless the said *Herman, Sillem, Son & Co.* shall make any further insurance in any of the public offices or elsewhere, during the

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continuance of this policy; in which case the insured to make a declaration of the same by indorsing such as he so insures, in the public offices or elsewhere, on the back of this policy; and we the insurers will then be contented to pay our equal average on the loss sustained with the said public offices or elsewhere. In witness whereof we have subscribed our names and sums of money by us insured. Dated in *London*, the 7th day of *April*, 1851, 1600*l.*: *Richd. Thornton*, p. *W. T. Williams* sixteen hundred p^{ds}." The paper mentioned in the policy as annexed thereto was as follows. "Description of brick store on the corner of *Clay* and *Leidesdorff* Streets. Frontage on *Clay* Street 30 feet, on *Leidesdorff* Street 59½ feet, more or less. The house is composed of two stories without a basement storey. The ground floor is 12 feet, the upper one 10 feet, in height: the walls from the foundation to the upper story of 12 inches thickness: the ground floor is paved with marble slabs: the roof is composed of a layer of cement and wood and covered with zinc: the walls around the same are raised 3 feet on two sides, and on the south side about 9 feet, there being at present a wooden building adjoining. On the roof is a reservoir containing about 600 gallons of water: this is supplied from an artesian well on the ground floor, 100 feet deep, in connexion with which is a powerful force pump, by which the first floor is also constantly supplied with water; the roof is also so constructed that, by means of a pipe, extending the whole length of the same, and supplied at certain intervals with holes, a constant stream of water can be maintained over the entire roof by working the pump on the lower story. The window and door frames are attached towards the interior of the building: the windows and doors are supplied with thick iron shutters

on the exterior, so that, between the shutters and window or door, is in all places a space corresponding with the thickness of the walls; in this manner no wood work whatever is exposed externally. The house has been built with the express design of rendering it fire proof; and no precaution has been neglected to render it so. The tide rises to the opposite side of *Leidesdorff* Street, which is still unoccupied; and in the house itself is an almost unlimited supply of water from the artesian well already mentioned. The walls on the south and west sides are dead walls: these are constructed with a vacuum in the centre, so as to repel the influence of heat. *Godeffroy, Sillem & Co.* We the undersigned do hereby certify that, by request of Messrs. *Godeffroy, Sillem & Co.*, we repaired to their brick building at the corner of *Clay* and *Leidesdorff* Streets, and, after a true and faithful examination, found the above description of the same a perfectly correct one. And we further willingly declare that, so far as we can judge, nothing has been omitted in rendering the house fire proof. 31st *October*, 1850. Given under our hands this 30th day of *October*, 1850. *B. Davidson. J. De Puisage Green, Lloyd's Agent*, in the absence of *H. W. Henrickson. Heron Reincke*, Agent for the *Hambro'* Board of underwriters." On the night of the 3d of *May*, 1851, a fire took place at *San Francisco* by which a great part of the City, and, amongst others, the premises insured, were burnt to the ground: and the plaintiffs suffered a total loss, with the exception of a salvage amounting to 400*l*.

The Court to have the same power to draw inferences of fact as a jury, and may allow interest, under stat. 3 & 4 *W. 4. c. 42. (a)*, from the 3d *May*, 1851.

(a) Sects. 28, 29.

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The question for the opinion of the Court is: Whether the plaintiffs are entitled to recover in the action; whether that right is defeated by the alterations and additions aforesaid, which were made in the building. If the Court should decide that the plaintiffs are entitled to recover, the verdict is to be entered for the plaintiffs for 1800*l.*, less a proportional deduction for the salvage if the Court may consider the defendant entitled to it, and also interest if adjudged by the Court. If otherwise then a verdict to be entered for the defendant, upon such issue or issues as the Court may direct.

The case was now argued (a).

Bramwell, for the plaintiffs. The house insured have been destroyed by fire, it lies on the underwriter to show why he does not pay the insurance money. An alteration, if such as to change the nature of the subject matter of insurance, no doubt discharges the underwriters. If so long as the thing insured remains the same, an alteration will not avoid the policy, unless it be either fraudulent, which is not in this case pretended, or a breach of some condition, imposed by contract either express or implied. In the present case the dates are material. On 30th *October*, 1850, the description contained in the paper attached to the policy, signed in *California*. It was at that time accurate. 26th *March*, 1851, the alterations commenced: it does not appear how far these had gone when the policy was signed; but they were completed before the fire, in *April*, 1851. The policy was signed in this country on 26th *March*, 1851, after the alterations had commenced.

(a) Before Lord Campbell C. J., Coleridge and Erle J^s. *Crompton* also heard the beginning of the argument, but went to Chambers at its conclusion, and took no further part in it.

California, but before it could possibly be known, in this country, that they had commenced; and the risk commenced on 1st *February*, 1851. So that the description was accurate when given, was accurate when the risk commenced, was believed, in this country, to be accurate at the time when the policy was signed, though it may then have become inaccurate, and was certainly inaccurate at the time of the fire. Now, if this description is a representation merely, the alterations, being found not to have increased the risk of fire, are immaterial. [Lord *Campbell* C. J. It may not increase the chance of a fire happening; but it must increase the liability of the insurer, in case of a partial loss, if the subject matter of a fire policy is made more extensive. Do you contend that, in case of a partial loss, the underwriter would not be answerable for the damage done in the addition to the building?] No. But, though the risk may in that sense be greater, nothing can discharge the underwriter but either fraud in the conception of the policy, or a breach of some condition, express or tacit. If the reference in the policy to the description, contained in the paper attached to it, is to be construed as a promissory warranty that the description shall continue accurate, throughout the risk, so that the plaintiffs have by their bargain bound themselves, under pain of forfeiting their policy, to make no alteration whatever in their premises, the plaintiffs have broken an express condition. But there is no such improvident bargain. The description is, at most, a warranty that the buildings did answer that description when it was made, not a promise that they should continue to do so. Neither is there any tacit and implied condition in a fire policy that the buildings shall not be altered. In general, in

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fire policies there are special conditions indorsed on back of the policy, by which the insured undertakes to suffer a dangerous trade to be carried on on premises, and various other stipulations against this increasing the risk. In *Shaw v. Robberds* (a) this Co said that a condition, requiring an accurate description of the premises insured, "points to the description the premises given at the time of insuring; and that description was in this instance perfectly correct. Nothing which occurred afterwards, not even a change of business could bring the case within that condition, which was fully performed when the risk first attached." In *P. v. Reid* (b) the question was as to sufficiency after verdict of two pleas, which alleged an alteration of the trade carried on on the premises insured, to one more hazardous. The Common Pleas held them bad. The reasons given are that an alteration made after the policy, if without fraud, does not by the general law of insurance vitiate the policy; and that the express conditions, in that case, were to be construed as stipulations for the accuracy of the description at the time of signing the policy. In the present case, the terms of the description are such as to shew that the representation was that it was accurate when signed, that is in *October* 1850, and, tacitly, that at the latest advices from *California* it still remained accurate. It could never be understood by the parties that, when insuring against fire in *California* from an antecedent day, the insured absolutely warranted that the premises still remained in the state they were in when last heard of, a thing which they could not know.

(a) 6 A. & E. 75. 82.

(b) 6 M. & G. 1; 5 C. 6 Scott, N. R. 982.

James P. Wilde, contra. The fourth issue should be found in favour of the defendant; for the alterations are material. The increase of a house, by adding a third story, may vary the probability of a fire occurring, and must, at all events, increase the liability, if a fire does occur. Supposing that the upper story, which is worth 1000*l.*, be destroyed, and that 200*l.* worth of damage be done in the lower stories, the underwriter, if liable for the whole building, must pay 1200*l.*; if liable only for the lower stories, he only pays 200*l.* And the fifth and sixth issues, also, should be found for the defendant. The plaintiffs might if they pleased, have sent to their agents a statement that they proposed to make some alterations, and have let that be communicated to the underwriter in order that he might judge whether he would demand a higher premium. Instead of doing so, they send off a description; and then, before it is acted on, intentionally alter the house, so that, as they know, their agents in *England* will, bonâ fide on the part of the agents, make a representation no longer true. In *Cornfoot v. Fowke* (a) all the Court agreed that, if the principal had intended his agent to make the false representation, it would have avoided the contract in that case; and, of course, a fortiori it will avoid a policy, an instrument in which a misrepresentation, though made by inadvertence, avoids the contract; note (1) to *Goram v. Sweeting* (b). Here the representation was true when made in *California*; but, before it was made to the defendant in this country, it was, by the plaintiffs' voluntary act, made untrue. But it is

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(a) 6 *M. & W.* 358.(b) 2 *Wms. Ssund.* 200 b.

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scarcely denied that the description in the policy is warranty, though it is said to be not a promissory warranty, but merely an affirmative one. But, as is said *Arnould on Insurance*, vol. 1. p. 502., "most positive representations, even when in terms affirmative, in effect are promissory. Thus, where it is represented that vessel is neutral, or has a licence to trade, or has certain armament, or a certain kind of cargo, the mere affirmation of these facts as existing at the time, is unimportant; it is the implied promise that, as far as depends on the assured, they shall continue unchanged throughout the duration of the risk, that alone gives value to the representation." The warranty is not that every minute particular in the description shall be accurate whether material to the risk or not: as is pointed out in *Phillips on Insurance* (3d ed.) vol. 1. p. 468., it would be no matter if the wrong number in the statement were given; but the warranty is confined to the parts of the description substantially affecting the risk. And accordingly, in the cases in which the insured has succeeded it will be found that the warranty was substantially complied with. In *Shaw v. Robberds* (a) the warranty was that it was a kiln for drying corn. (On one occasion the insured, gratuitously, allowed some damaged bark to be dried. The decision of the Court was that the kiln still remained a kiln for drying corn and "that this single act of kindness was no breach of the sixth condition" (b). In *Dobson v. Sotheby* (c) the warranty was that no hazardous goods were kept on the premises. Lord Tenterden's ruling was that bringing

(a) 6 A. & E. 75.

(b) 6 A. & E. 83.

(c) Moo. & M. 10.

in a single tar barrel, for a temporary purpose connected with the occupation of the premises, was no substantial breach of this warranty. *Mayall v. Mitford* (a) was a decision that "worked by day only" was not a warranty that no part of the machinery would ever be set in motion at night, but only that the mills would not substantially be worked at night. *Pim v. Reid* (b) is a case to the same effect. That case, and *Shaw v. Robberds* (c), as was said by the Court in *Barrett v. Jermy* (d), are decisions "that a casual use is not sufficient to avoid a policy." But here is a substantial permanent alteration.

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Bramwell, in reply. If by the general law there is an implied condition that the insured shall not make an alteration in the state of the premises, the Judges who decided *Pim v. Reid* (b), or at all events *Tindal* C. J., *Maule* J. and *Cresswell* J., were wrong; for each of those Judges makes it the foundation of his judgment, that, in the absence of fraud, an alteration does not vitiate a policy, unless by some condition in the policy the alteration is provided against. If they are right, the plaintiffs are entitled to judgment.

Cur. adv. vult.

LORD CAMPBELL C. J., on a subsequent day in this Term (June 13th), delivered judgment.

We are of opinion that, in this case, the assured are not entitled to recover, as they have broken a warranty, on the faith of which the defendant must be considered as having signed the policy. The engagement is, "to

(a) 6 A. & E. 670.

(b) 6 M. & G. 1; S. C. 6 Scott, N. R. 982.

(c) 6 A. & E. 75.

(d) 3 Exch. 535, 545.

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insure from loss or damage by fire a brick building used as a dwelling house and store (described in the paper attached to this policy, situated" &c., "belonging to Messrs. Godeffroy, Sillem & Co.," "valued at 4000 sterling from noon on the 1st day of *February*, 1851 to the 1st day of *February*, 1852, at noon." The description, in the attached paper, must be supposed to be introduced into the body of the policy between the brackets, instead of the reference to it. *Verba relata inesse videntur*. The following is the commencement of this description: "Frontage on *Clay Street* 30 feet, on *Laidendorff Street* 59½ feet, more or less. The house is composed of two stories without a basement story. Then comes a statement, among other things, that the ground floor was covered with marble slabs; that the roof was composed of cement, and covered with zinc that on the roof was a reservoir, containing about 60 gallons of water, which was supplied from an artesian well; that a constant stream of water could be maintained over the entire roof, by working the pump on the lower story; that all the windows and doors were supplied with thick iron shutters, so that no wood work was exposed externally; and that there was an almost unlimited supply of water from the artesian well. The special case finds that this house was built, in *September* 1850, at a cost of 6000*l.*; and that Messrs. *Godeffroy Sillem & Co.*, in the month of *October* following, being desirous of effecting an insurance upon it, transmitted to their agents in *London* the description of it attached to the policy. This was a correct description of it, in all respects, as it then stood; and, on the faith of the description, the defendant signed the policy, dated 7*th* *April* 1851. But, in *March* 1851, Messrs. *Godeffroy*

Sillem & Co. were desirous of adding a third story to the building. They commenced doing so on the 26th of that month, and had completed it before the 3d of *May*, when the premises were consumed by a conflagration which laid in ashes almost the whole of *San Francisco*. The new story cost 1000*l*. There were various alterations in the roof and other parts of the buildings: but it was agreed in the case that the new works "are to be taken as not having increased the hazard or probability of fire, except so far (if at all) as the increase of the area of a building by a third story may be considered by the Court to have necessarily increased such hazard or probability." We are now to consider the effect of the description of the premises insured, which has been introduced into the policy. And, in the first place, we are of opinion that it amounts to a warranty that the premises corresponded with it on the 7th *April* 1851, when the policy was effected, or, at least, that the premises had not been altered by the assured in the intermediate time, so as to increase the risk of the insurer. *Mr. Bramwell* contended that it referred only to 31st *October* 1850, the date of the certificate of the surveyors, in *California*, who verified its accuracy; and that, if accurate at that time, the policy would not be vitiated by any alteration between that day and the date of the policy, so that, notwithstanding the alteration, the identity of the house was not destroyed. But we think that this position is wholly at variance with the effect which has hitherto been given to the description of the subject matter insured in policies of insurance, and would utterly defeat the object for which such a description is required. It would seem revolting to common sense, if we were to hold that, as soon as *Messrs.*

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Godefroy, Silen & Co. had sent off the description, be shewn to an insurance office or private underwriter they might have added several stories to the house, & removed from it all the described safe-guards against fire, and that, although the description misdescribed the actual state of the premises at the date of the policy, a fire afterwards happening, an indemnity might be claimed, for which the underwriter had received adequate consideration. But this is the principle contended for by the assured. Not being told the exact progress which had been made in the alterations between the 26th of *March* and the 7th of *April*, we are to draw inferences from the facts stated; and we infer that, on the 7th of *April*, the building no longer corresponded with the description of it in the policy, and that, by the alteration, the risk of the insurer had in some degree been increased. This alone would be a bar to the present action.

But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do any thing to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and, if he does take it, what premium he shall demand. The assured no doubt wished him to understand that, not only such was the condition of the premises when the policy was to be effected, but, as it depended upon them, it should not be altered so as to increase the risk during the year for which he was

be liable, if a loss should accrue. Without such an assurance and belief, the statement introduced into the policy of the existing condition of the premises would be a mere delusion. Identity might continue, and yet the quality, condition and incidents of the subject matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis?

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With respect to marine policies, we conceive that, if there be a warranty of neutrality, or of any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a time certain, such a warranty is continuous, and, if it be broken by the default of the assured, the underwriter is discharged. The implied warranty of seaworthiness applies only to the commencement of the voyage; but, even here, if the assured, during the voyage, were, voluntarily, to do any act whereby the ship was rendered unseaworthy, and thereby a loss were to accrue, we conceive that they would have no remedy on the policy.

A distinction, however, is taken in this respect between marine policies and insurances of houses against fire. It would probably be allowed that, if during war there were a policy on a merchant ship described as carrying ten guns and employed in the coal trade, and, after the policy was effected, the owner should reduce her armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss. But it is strenuously asserted that, if there be an insurance against fire upon a house,

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which is described in the policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade, this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated. The construction and use of the premises insured, as described in the policy, constitute the basis of the insurance, and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running, and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer. It seems strange then, that, if a house be described in the policy as occupied by the owner carrying on the trade of a butcher, so that the premium is on the lowest scale, he may immediately afterwards merely taking care that the walls and floors and roof remain, so that it is still the same identical house, convert it into a manufactory for fireworks, a trade trebly hazardous, for which the highest scale of premium would be no more than a reasonable consideration for the stipulated indemnity. We are told however, that this doctrine is established by decisions binding upon us. The first of these is *Shaw v. Robberds* (a). Plaintiff insured premises against fire by the description of “

(a) 6 A. & E. 75.

granary" and "a kiln for drying corn in use." By the conditions of insurance the policy was to be forfeited unless the buildings were accurately described, and the trades carried on therein specified; and, if any alteration were made in the building, or the risk of fire increased, the alteration was to be notified and allowed by indorsement on the policy, otherwise the insurance to be void. The plaintiff carried on no trade in the kiln except drying corn; but, on one occasion, he allowed the owner of some bark, which had been wetted, to dry it *gratuitously* in the kiln; and this occasioned a fire by which the premises were destroyed. Drying bark was proved to be a distinct trade from drying corn, and more hazardous, insurance offices charging a higher premium for bark kilns than corn kilns. Held, that the plaintiff was entitled to recover. But what was the ratio decidendi? Lord Denman C.J. (d): "If the plaintiff had either dropped his business of corn-drying, and taken up that of bark-drying, or added the latter to the former, no doubt the case would have been within the condition relied upon. Perhaps, if he had made any charge for drying this bark, it might have been a question for the jury whether he had done so as a matter of business, and whether he had not thereby (although it was the first instance of bark-drying) made an alteration in his business, within the meaning of that condition. But, according to the evidence, we are clearly of opinion that no such question arose for the consideration of the jury." The Court there intimates an opinion that there was no implied warranty that nothing besides corn should ever be dried in the kiln, but gave no countenance to the

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doctrine that another and more dangerous trade could be carried on in the kiln without vitiating the policy. The other case, which was more confidently relied upon, and, on account of some expressions of some of the Judges, not without reason, was *Pim v. Reid* (a). When examined, we do not think it is an authority for the doctrine which it is cited to support. The insurance was upon a manufactory, engine house and machinery against fire; and the policy contained conditions resembling those in *Shaw v. Robberds* (amongst others), that, if the assured should "omit to communicate" to the insurance office "any circumstance which is material to be made known to the Company in order to enable them to judge of the risk, they have undertaken or were required to undertake, the insurance should be of no force." There were pleas on these conditions, alleging that the assured carried on a trade more dangerous than that specified in the policy, and that there was a circumstance material to be made known, and omitted to communicate it to the office, the non-communication being made the infraction relied upon in the gist of the pleas. The issues on these pleas were found for the defendant; but there was a rule for judgment for the plaintiff non obstante veredicto, which was made absolute. The pleas were considered bad, for shewing that a reasonable time had elapsed for giving notice; and on this defect alone *Coltman J.* rested his judgment. The other Judges do make use of similar observations, as if, under this policy, the assured might change his trade to one more dangerous than that described at the time of making the policy; but that

(a) 6 M. & G. 1; S. C. 6 Scott N. R. 982.

(b) 6 A. & E. 72.

observations appear to have reference to the necessity for giving notice for the particular purpose specified in the conditions on which the pleas were founded.

Tindal C. J. says: "How can an alteration which takes place in the enjoyment of the premises after the execution of the policy be a circumstance material to be made known to the Company in order to enable them to judge of the risk they have undertaken?" And *Maule* J. observes: "The time at which the Company are to exercise their judgment is not the time at which the communication is to be made." Therefore this case cannot be considered an authority for the doctrine sought to be established; and, if it were, we could not concur in it; for the doctrine appears to us to be contrary to the principles of justice; and it is certainly contrary to the ruling of Lord *Tenterden* in *Dobson v. Sotheby* (a). There the insurance was on premises against fire, "wherein" (according to the statement in the policy) "no fire is kept, and no hazardous goods are deposited." The loss happened in consequence of the making a fire and bringing a tar barrel on the premises, for the purpose of repairing them. The plaintiff was held entitled to recover: but Lord *Tenterden* said that, if there had been any misdescription of the property insured, the defendants certainly were not liable, and added: "I think that the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises." "I cannot, therefore, be of opinion that the policy in this case was forfeited."

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(a) *Moo. & M.* 90.

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Now, assuming the law to be that, upon an insurance against fire, there is an implied engagement that assured will not afterwards alter the premises, so as they shall not agree with the description of them in policy, and so that thereby the risk (and liability of insurer shall be increased, we have only to consider whether, in this instance, the assured have not done by converting the house insured from a house "composed of two stories" into a house composed of three stories. And this really admits of no reasonable doubt. *Bramwell*, very candidly, admitted that, if the policy remained in force after the alteration, it covered third story as well as the other two. This being so, increase of the area of the building by a third story must be considered by the Court to have necessarily increased the hazard or probability of fire, about much as if the addition to the house had been lateral instead of vertical. But there is another consideration which is quite decisive to shew that, by the alteration the liability of the insurer is increased, and that premium, if previously fair, has now become inadequate. Upon an insurance of a house against fire the insurer must make good the whole of any partial loss, the owner not being considered to stand his own insurer for excess of the value of the house beyond the sum which the insurance is effected. The value of additional property, here sought to be covered by insurance, must be taken to be 1000*l.*; and for whole of this, or any part of it, the defendant is liable to the full amount of the sum for which he subscribed the policy, till he has paid 1600*l.*, plus liability to this amount for the destruction of any part of the original house valued at 4000*l.* We are of opinion

that this additional liability could not be thrown upon him, without any consideration and against his consent, by the act of the assured in altering the house so as to make it no longer correspond with the description of the house in the policy. If the liability cannot be carried to this extent, it is entirely gone. And, therefore, we pronounce judgment for the defendant.

Judgment for the defendant.

JAMES JOSEPH REED, Appellant, against J. T. INGHAM, Esquire, Respondent.

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Wednesday,
June 5th.

NOTICE of appeal, against a conviction of the appellant by the respondent, one of the Metropolitan Police Magistrates, having been duly given; by consent of the parties, and by order of Lord Campbell C. J., a case was stated for the opinion of this Court, under stat. 12 & 13 Vict. c. 45. s. 11.

The conviction was set forth. The material part was, that, after the passing of stat. 7 & 8 G. 4. c. lxxv. (a), "the said James Joseph Reed had the working and management of a certain craft, to wit a tug boat called *The Newcastle*, the same craft not then being a western

Sect. 37 of stat. 7 & 8 G. 4. c. lxxv. (local and personal, public) imposes a penalty upon any person who, not being a freeman of the Waterman's Company, or an apprentice to a freeman or to the widow of a freeman, (with certain exceptions) shall "act as a waterman or lighterman, or ply, or work

or navigate, or cause to be worked, or navigated, any wherry, lighter, or other craft," upon the Thames, "from or to any place or places, or ship or vessel," within the limits of the Act, for hire or gain.

Held: that a steam tug of eighty seven tons burden, employed in moving another vessel, was not a "wherry, lighter, or other craft," under this section; and that a person navigating her for this purpose, not being a freeman &c., did not thereby incur a penalty.

(a) Local and personal, public: "For the better regulation of the Watermen and Lightermen on the river Thames, between Yantlet Creek and Windsor." (Printed among the statutes at large.)

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barge within the true intent and meaning of the Act of Parliament, or any boat, barge, lighter, or vessel excepted from the operation of the said Act. And that the said *James Joseph Reed*, not being a freeman of The Company of Watermen and Lightermen of the river *Thames*, or an apprentice to a freeman to the widow of a freeman, of the said Company, in any manner lawfully authorized to act as a waterman, lighterman, or to work or navigate the said craft, called *The Newcastle*, upon the said river, within the limits of the said Act, for hire and gain in manner herein mentioned, on" &c., "unlawfully, and contrary to the said Act, in violation of the said Act of Parliament, for hire and gain, did, on the said river *Thames*, at" &c., "within the limits of the said Act, to wit between *Yalding Creek* in the county of *Kent* and *New Windsor* in the county of *Berks*, in the said Act mentioned, work or navigate the said craft, to wit in moving and towing and in aiding and assisting in moving and towing certain large vessel, from a certain place in the said river there, to and into the mouth of a certain dock on the said river there, called *Green's Dock*, within the limits and jurisdiction aforesaid, and then and there on the said river *Thames*, at" &c., "unlawfully and contrary to, and in violation of, the said Act of Parliament, act as a Waterman and Lighterman, for hire and gain to wit in so moving and towing of the said large vessel as aforesaid, and in proceeding thereto, and returning therefrom, on the said river *Thames*, within the limits aforesaid, in the said craft called *The Newcastle*, information and complaint of which said offence was made to me the undersigned" &c. Adjudication to 1s. fine and 2s. costs.

The case stated that The Company of Watermen and Lightermen of the River *Thames* are incorporated under stat. 7 & 8 G. 4. c. lxxv. (a); and they are now governed by the provisions of that Act, and by certain by-laws made in pursuance thereof. Such by-laws were to accompany the case, and might be referred to, by the Court or either party, as part thereof, if the Court shall think fit. The 37th section of the Act enacts: "That if any person, not being a freeman of the said Company, or an apprentice to a freeman or to the widow of a freeman of the said Company, (except as hereinafter is mentioned,) shall at any time act as a Waterman or Lighterman, or ply, or work or navigate, or cause to be worked or navigated, any wherry, lighter, or other craft, upon the said river, from or to any place or places, or ship or vessel, within the limits of this Act, for hire or gain, (except as hereinafter is mentioned,) every such person shall forfeit and pay for every such offence any sum not exceeding ten pounds."

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The conviction appealed against was made in respect of an alleged infraction, by the appellant, of the provisions of this section. At the time of the commission of the said offence, the appellant was master of the steam tug boat called *The Newcastle*, and not a freeman of The Company of Watermen and Lightermen of the River *Thames*, or apprentice to a freeman, or to the widow of a freeman, or in any way authorized to act as a waterman or lighterman, or to ply, work or navigate any wherry, lighter or other craft, within the meaning of the said Act, within the limits mentioned in the said

(a) Sect. 4, by the name of *The Master, Wardens, and Commonalty of Watermen and Lightermen of the River Thames*.

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conviction, for hire or gain. The said steam tug was a vessel of the tonnage of 45 tons, exclusive engine room, and space for the boilers and for stowage of coals; the entire burden or tonnage of the said steam tug being 87½ tons, as per register; she was propelled by a steam engine of fifty horse power, and had been employed in towing all classes of sailing and steam vessels, many of them of large burden. (She) registered at the Custom House under the provision of the Register Act for shipping, 8 & 9 Vict. c. 89. She was also licensed, so long as such license was required, as a sea-going steamer, to go coastwise and to foreign ports, within the meaning of stat. 9 & 10 Vict. c. 11 and was subject to the provisions of that Act. The certificates might be referred to by the Court of all parties, if the Court should so please. The said steam tug boat had been employed in her ordinary business as well without and beyond as within the limits defined by the said Watermen's Act, that is to say between Windsor and Yantlet Creek below Gravesend, in towing vessels to and from London, from and to Dover, and intermediate ports and places. She had also been frequently engaged to take vessels up and down the English Channel and German Ocean, and to assist vessels in the Channel, and to tow and accompany vessels and from London, and ports on the south and east coast of England and ports of the continent of Europe, and had, in fact, been employed as much outside as within the limits mentioned in the conviction. The steam tug carries a small boat. On the occasion referred to in the said conviction, the said steam tug was employed by Blackwall, within the said limits, in towing and assisting a new steam vessel or yacht, belonging to the Pacha

Egypt, into a dry dock; and the appellant was then master of the said steam tug boat. There were not any goods or passengers on board either the said steam tug or the said yacht at the time referred to in the said conviction; and the steam tug was employed solely in towing and assisting the said yacht. The steam tug did not carry goods or passengers. The steam tug belongs to a Company called *The Ship-owners' Towing Company*, who are proprietors of several vessels of the same class. The Company has an office in *London*, at which orders are received for the tugs, and communicated thence to the masters of the vessels. Certain charges, according to the scales for the tonnage of the vessels towed, and the distances for which they are towed, are made by the Company, and without reference to the place at which the tug may happen to be at the time the order is received, or to which she may have to proceed after the job is complete, being contiguous or otherwise to the place where the ship to be towed may be at the commencement or termination of the job. The masters of the tugs also seek for jobs when at sea and on the river, and when engaged alongside, would make the same charge as if they had proceeded from a distance to fulfil orders previously received, the pay, in all cases, and in the particular instance referred to in the conviction, being calculated according to the work performed when attached to the vessel towed, and not on any other consideration. The appellant was paid a salary by the owners of the said steam tug, and was their servant.

Steam vessels have been employed on the river *Thames* for the last thirty years and upwards, but were not used for the purposes of towing until twenty years

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ago, and a considerable time after the passing of said Watermen's Act. At the time of the passing of Watermen's Act, and previously thereto, watermen employed (weather permitting) by the owners masters of vessels to assist such vessels into dock; such was an ordinary employment of watermen; they are constantly so employed up to the present time, though not to the same extent, in wherries small boats, as before the introduction of steam tugs. The said steam tug is within the provisions of 59th section of the Pilot Act, 6 G. 4. c. 125.

The master of the steam tug boat being within convenient distance of the yacht, a communication made between the two vessels by means of a rope; such communication having been made, the appellant (on the river *Thames*, within the limits aforesaid, hire and gain) towed the said yacht, in the manner mentioned in the conviction, but under such direction as is hereinafter mentioned. During such time, *Joseph John Waterson*, a freeman of The Company Watermen and Lightermen, and excepted from operation of the 37th section of the before recited Act, was on board of, and in command of, the said yacht, the purpose of superintending and directing the towing thereof into the said dock. For this service he was remunerated by the persons interested in the said yacht and he was not responsible to, or paid by, the owner of the said steam tug boat, or by the appellant. When attached to the yacht, the appellant obeyed the instructions given by the said *Joseph John Waterson* for the safe and proper towing of the said yacht: and this is the usual course in such case. The crew of the said steam tug boat and the persons putting the machinery the

in motion received their orders from the appellant, and were subject to his directions concerning the same, and not to the said *Joseph John Waterson*.

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The amount paid to the said steam towing Company for so towing the said yacht was the sum of 21.; and nothing was paid to or claimed by them for or in respect of the said tug boat's voyage to or from the said yacht. The appellant received no part of the amount paid in respect of the services rendered to the said yacht; his remuneration for so doing was included in his salary.

The use of a steam tug boat, in the way and for the purposes before mentioned, requires skill and knowledge of the tides and eddies, shoals and land marks of the said river; and the master must also be competent at sea.

There are lighters and barges upon the river *Thames*, and navigating the same, of as great a burthen as 80 or 90 tons, and steam boats for carrying passengers, whose journeys commence and terminate within the limits of the Act, of as great a burthen as 150 or 200 tons.

The question for the opinion of the Court is: Whether the said conviction of the said *James Joseph Reed*, under the circumstances aforesaid, is authorized by the before recited Act. If the Court should be of opinion that it was so authorized, then it is agreed that such conviction be confirmed. If the Court should be of the contrary opinion, then such conviction is to be quashed. And it is hereby agreed between the said appellant and the said respondent that a judgment in conformity with the decision of this Court, and for such costs, if any, as this Court shall adjudge, may be entered on motion by either party at the Court of General Quarter Sessions

1854. of the Peace for the county of *Middlesex*, next or next
 REED but one after such decision shall have been given
 v. (Power to this Court to remit the case for amendment.)
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Montague Chambers (a), in support of the conviction. The principal question is, Whether this steam tug is "craft" within the meaning of stat. 7 & 8 G. 4. c. lxxv. s. 37. A steam vessel was held to be included in the word "craft" used in sect. 57; *Tisdell v. Combe* (b) [Lord Campbell C. J. But must we not, in construing sect. 37, look to the purposes to which wherries and lighters are applied?] The case finds that free watermen had, before the Act, done the work of towing in wherries and lighters; the object of the Act was to regulate the work properly done by watermen. Then, as to the minor point, it is clear that the captain of the tug was the person who plied; the captain of the towed vessel hired the captain of the tug, and did not ply himself.

Sir F. Thesiger, contra. It is of course not suggested on the other side, that this steam tug is either a wherry or a lighter. The question is, therefore, whether it is "other craft" within the meaning of sect. 37. Now by these words craft only of the same kind as wherries and lighters must be meant. Stat. 11 & 12 W. 3. c. 21, regulated the Company or Society of Watermen. Sect. 4 gave power to the governing body, as thereby constituted, to make by-laws. Sect. 7 prohibited any person (except Trinity men) not having served an apprenticeship, or being apprentice or servant, to a waterman.

(a) The argument commenced on June 3d, before Lord Campbell C. J., Coleridge and Erle Js.

(b) 7 A. & E. 788.

from working, rowing or plying in boats, wherries or barges ordinarily carrying passengers for profit. It is clear that the watermen in this Act constituted a class altogether different from the present navigators of steam tugs. Then as to stat. 7 & 8 G. 4 c. 124. *Tisdell v. Combe* (a) was decided on sect. 57 which empowers the Court of Mayor and Aldermen of London to make laws for governing the boats, vessels, and other craft to be rowed or worked within the limits of this Act. That section contains the word "vessels," which does not occur in sect. 87. Lord Denman C. J. considered that a steam boat was a "boat;" but *Littledale* and *Williams* J. relied principally on the word "vessels." And *Coleridge* J. pointed out that sect. 106 furnished an argument as to the extent which the Legislature meant to give to the authority of the by-laws under sect. 57. Here the question is not as to the by-laws; and the word "vessels" is not in the section now under discussion. In *Blanford v. Morrison* (b) a question arose whether, in sect. 4 of the Act regulating the vend and delivery of coals in London &c. (1 & 2 Vict. c. 11, local and personal, public), the words "lighter, vessel, barge, or other craft" included a coast brig, in which the coals had been originally shipped: and the Court of Exchequer Chamber held that it did not; *Parke* B. explaining that "vessel" could not mean more than "craft," and assuming that "craft" could not apply to such brig. Sect. 38 of stat. 7 & 8 G. 4 c. 124 authorizes the Court of the Master &c. of the Company to licence any "wherry, boat, or other vessel," for carrying passengers on the Thames for hire, and plying at the public stairs; but it cannot be

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(a) 7 A. & E. 788.

(b) 15 Q. B. 724.

1854. contended that they are to licence this steam tug. &
 REED sect. 39 empowers the Court to cause the names &c. of
 v. the owners to be painted on "any lighter, barge, or
 INGHAM. other boat or craft used or to be used for the carrying
 of goods, wares, or merchandize, without passengers:
 but this is manifestly confined to the smaller craft
 plying on the river. A similar argument is deducible
 from sect. 40, which applies to "any lighter, barge, or
 other boat, craft, or vessel, used or to be used for the
 carrying of goods, wares, or merchandize, which may be
 navigated on the said river within the limits of this
 Act," whereof the owners reside without the limits. By
 sect. 36 the apprentice, to be entitled to take the sole
 care of the vessel, must "have worked and rowed upon
 the said river as an apprentice" for two years; a pro-
 vision entirely inapplicable to the training for managing
 a steam tug. Further, sect. 37 applies only to working or
 navigating "from or to any place or places, or ship or
 vessel," the place apparently applying to the wharves
 and the ship to the lighters: but these terms do not
 comprehend the employment to which this steam tug
 was applied. Again, the master of the steam tug is not
 the pilot within stat. 6 G. 4. c. 125. s. 70., but the
 master of the vessel towed; *Beilby v. Scott* (a). The
 latter therefore is the person really navigating both
 and he is a freeman of the Company.

Ballantine (in the absence of *M. Chambers*), in reply
 The argument as to the training for the management of
 the vessel fails: whatever the size or nature of the
 vessel, a familiarity with the depths and currents of the

(a) 7 M. & W. 93.

river must be important ; and this would be acquired by rowing as an apprentice. [Lord *Campbell* C. J. But it would not be enough.] *Tisdell v. Combe* (a) has not been distinguished. In *Blanford v. Morrison* (b) the statutory provision related to vessels bringing the coals from the original carrying vessel to the shore, and were therefore held inapplicable to such vessel when she landed the coals without the aid of any other vessel. Here the object of the Act is to prevent persons from navigating in the *Thames* who have not been familiarized with the river. The words “worked” and “navigated” seem scarcely applicable at all to wherries. In sects. 56, 57, the words are different, because an authority extending beyond the limits is given to the by-laws.

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Lord CAMPBELL C. J. We are called on to construe the word “craft” as used in sect. 37. No doubt that word may comprehend such a steam tug as this. But is that the sense in which the word is there used ? The provisions of the section clearly interfere with the general right of the subject, and establish a monopoly and impose a penalty. We are therefore to construe them strictly, like penal enactments. Can we then suppose it to have been within the intention of the Legislature to prevent any one, not being a freeman of the Watermen’s Company, or otherwise privileged as specified in the section, from using a steam tug for the purposes mentioned in this case, and to inflict a penalty upon such use ? I am of opinion that this was not the meaning of the Legislature. When they use the word

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(b) 15 Q. B. 724.

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"craft," we must see how the word is placed, and to collect their intention. We find it preceded by words "any wherry, lighter, or other;" and I think this steam tug is not ejusdem generis with "wherry" and "lighter," and therefore is not within what the Legislature intended by the use of the word "craft." The preceding enactments seem to shew that the wherries are to take care of the wherries and lighters, passengers and goods on the *Thames*: and this steam tug, not being so employed, is not within the contemplation of the Act, which gives a monopoly exclusive of the Queen's subjects from doing what they had done before. I do not refer particularly to the several enactments: but they all lead to the view that the wherries are to be protected in doing all that is to be done by wherries and lighters, and that the protection is not to extend to vessels of a different kind. *Tisdell v. Combs* has been properly referred to: and I think it was properly decided; for the enactments there were different from those which we are now considering, and had different objects, namely to give the Court of Aldermen and aldermen power to regulate the boats and wherries on the *Thames*: the language there differed from that of sect. 37; and the object was, not to establish a monopoly or impose a penalty, but purely to secure safety. *Blanford v. Morison* (b) was decided upon a totally different statute, and has no application to the present case. Looking at sect. 37 as compared with the other sections, I am of opinion that the appellant has incurred no penalty.

(a) 7 A. & E. 788.

(b) 15 Q. B. 724.

ERLE J. (a). I am also of opinion that the appellant has incurred no penalty; in other words, that he has not worked or navigated "any wherry, lighter, or other craft," within the meaning of sect. 37. What he has done is, to navigate a steam tug in moving a vessel. And the question is, whether that is within the words of the section. All turns upon the wide term "craft." It is said that this may include a steam tug; and so it may: but it is a general rule that, when a word of wide signification follows others of a signification less wide, it must be interpreted as having a meaning bringing it within the same class as those others. I think, therefore, that "craft" must be confined to vessels of the same kind as the wherries which are employed for passengers and the lighters which are employed for goods. In common understanding, a steam tug is a vessel of quite a different kind. The question is, whether a penalty has been incurred by infringing upon the watermen's privilege. This privilege was given for the public good, on the presumption that the watermen will go through the proper means of qualifying for the duties which they will have to perform. The sections referred to by Sir *Frederick Thesiger* shew most cogently what those duties are: and it is clear to me, notwithstanding what has been urged by Mr. *Ballantine*, that the men who are qualified to manage the vessels which are the subjects of sects. 38, 39 and 40 could not be presumed to be capable of managing a steamer; and that the knowledge which they would acquire of the river by plying the smaller vessels would be inadequate for that purpose. I think therefore that the case before us was

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(a) *Wightman J.* had left the Court.

1854. not one contemplated by the Act, which, being i
restraint of industry, is to be construed strictly.

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CROMPTON J. I did not hear the argument for the respondents: and I can only say that, so far as I have heard the case, I agree with the judgments which have been delivered.

Judgment for the appellants, without costs.

Thursday,
June 8th.

WILLIAM DOWDELL *against* The AUSTRALIAN
Royal Mail Steam Navigation Company.

Plaintiff obtained a verdict. Defendant obtained a rule Nisi for a new trial, which was discharged. Plaintiff was a witness in his own cause; and he remained in this country till after the rule Nisi was discharged. On taxation the Master allowed the plaintiff subsistence money from the time the rule was granted till it was discharged.

On a rule to review the taxation,

Held: that, as the Master must be taken to have found that plaintiff was a necessary witness, that he could not have attended a second trial, if one were ordered, unless he remained, and that his remaining incapacitated him from earning his subsistence, detention might, under those special circumstances, be considered as part of the cost of the rule; and the allowance was right.

It is not a general rule that parties, if witnesses, are to have an allowance for their attendance.

LUSH, in this Term, obtained a rule Nisi to review the Master's taxation in this cause. The plaintiff was a seafaring man, whose occupation was that of a purser on board ship. He brought an action against the defendants, which was tried at the sittings in *Middlesex* after last *Michaelmas* Term, when the plaintiff obtained a verdict. In *Hilary* Term, the defendant obtained a rule Nisi for a new trial, which was discharged in *Easter* Term. The plaintiff was examined as a witness on his own behalf at the trial; and it was sworn, in the affidavit of increase, that plaintiff had necessarily been detained in this country ever since the commencement of the action, for the purpose of giving

evidence in the cause, and that his evidence was of such importance that the cause could not have been safely brought to trial in his absence. The Master made an allowance for the plaintiff's detention, from the time of the rule for the new trial being granted, till it was discharged.

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J. Gray now shewed cause. The plaintiff stayed in this country, not as plaintiff in the cause, but as a witness. His testimony would have been necessary if the rule had been made absolute; and therefore it was proper to detain him, and the costs of doing so should be allowed. [Lord *Campbell* C. J. If there had actually been a new trial that might be so. But do you find any authority for allowing the costs of a witness detained in reasonable expectation of a new trial, which did not take place?] There seems no express decision either way. In *Mount v. Larkins* (a), where the Prothonotary had made the witness an allowance only up to the first trial, the Court of Common Pleas refused to order an increase in the allowance: but the reason given was that the Court had intimated that the new trial, if granted, would be confined to a point on which the evidence of the witness was not material. [*Crompton* J. If a witness were brought and detained here in bonâ fide and reasonable expectation of a trial, and there never was any trial at all, would his costs be allowed?] They would be allowed; *Tremain v. Barrett* (b), *Loneragan v. The Royal Exchange Assurance* (c). In the latter case there was no trial, as appears by the report in *Dowling*, though not by that in *Bingham*. Then the

(a) 8 Bing. 195.

(b) 6 Taunt. 88.

(c) 7 Bing. 725; S. C. 1 Dowl. P. C. 223, 233.

1854. plaintiff is not differently situated, in this respect, from any other witness. The rule is laid down by this Court in *Howes v. Barber* (a): "The reasonable expences which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of just demand, or to seek redress for an injury, should be thrown on the wrong doer." Then, the question whether the detention of the plaintiff was necessary and the expences reasonable, is for the Master.

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Lush, in support of his rule. *Howes v. Barber* (a) laid down the rule that the costs of the party, when witness, were to be paid like those of any other witness. But there is no case in which the expences of the detention of any witness waiting for a new trial have been allowed, though there must have been very many cases in which they have been incurred. The law does not profess to give an entire indemnity by giving costs. There are many expences proper to be incurred which are not allowed. In *Loneragan v. The Royal Exchange Assurance* (b) the defendant seems to have submitted and paid only at the last moment, so that the costs in question were incurred by his fault. And the plaintiff is not quite like any other witness; he has full control over himself. [*Crompton J.* That is a reason why the case should be more closely watched; but the only distinction between the case of a plaintiff being a witness in his own behalf and an ordinary witness is that the master should be more vigilant in exercising his discretion.]

Cur. adv. va.

(a) *Q. B. Trinity Term, 1852*

(b) 7 *Bing.* 725; *S. C.* 1 *Dowl. P. C.* 223, 233.

Lord CAMPBELL C. J., on a subsequent day in this Term (*June 15th*), delivered judgment.

After much hesitation, and great doubt, we have in this case come to the conclusion that the rule to review the taxation must be discharged. But we are anxious that it should be understood that we lay down no general rule, that, after a rule Nisi for a new trial has been obtained, the witnesses may be detained at the cost of the losing party. The circumstances in the present case are peculiar. The plaintiff was a witness in his own cause; and his evidence at the trial was material: his regular employment was one which required him to be absent from this country: after he had obtained a verdict, a rule Nisi was granted for a new trial, which was ultimately discharged. The Master, on taxation, made the plaintiff an allowance from the time the rule was granted till it was discharged, but only on the ground that the plaintiff was a necessary witness in his own cause; that he could not possibly be ready to give evidence on the second trial, if one had been ordered, unless he remained in this country; and that his remaining here deprived him of his ordinary means of earning subsistence by going abroad, and that he could not earn anything here. Under these circumstances, we think that this was an expense occasioned by the defendants' resistance, and that it may properly be considered part of the costs of the rule for a new trial. We do this, taking it to be found, as facts, by the Master that the evidence of the plaintiff would be material, that in order to give it the detention was necessary, and that the detention deprived the plaintiff of the means of subsistence: except under such circumstances the allowance ought not to be made. We must guard carefully

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1854. against an abuse by which parties in a cause as witnesses, obtain an allowance which they are entitled to as parties. Under such peculiar circumstances as the present the allowance was right: but most earnestly desire that it may not be considered a general rule that parties, if witnesses, are to have allowance for their attendance.

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Rule discharged

Thursday,
June 8th.

ROGER SHARPLEY, Appellant, *against* 1
Churchwardens and Overseers of the P
of the Parish of MABLETHORPE, Responder

Appeal against
a poor rate for
the parish of
M., on the
ground that
the alleged
parish of *M.*
in truth con-
sisted of two
distinct
parishes, *M.*
St. Mary
and *M. St.*
Peter, each
of which ought
to be rated

NOTICE of appeal having been given against a poor rate for the relief of the poor of the parish of *Mablethorpe, Lincolnshire*, by a person rated, the following case was, by consent and by order of a judge, stated for the opinion of this Court.

The appellant's ground of appeal against the rate was that the alleged parish of *Mablethorpe*, in truth, consisted of two separate parishes within itself, and consists of, two separate parishes, *M. St. Mary* and *M. St. Peter*, each of which ought to be rated separately. A case was stated with power to the Court to draw inferences of fact. By it appeared that from very early times there were de facto two rectories, one of *M. St. Mary* and the other of *M. St. Peter*, distinct parishes for ecclesiastical purposes; but that, as far back as evidence went, which was not beyond the beginning of the eighteenth century, there had always been one poor rate, one set of overseers, and one constable for the whole of *M.* as one parish for civil purposes, and the highways in *M.* had been jointly maintained by the whole of *M.*

In the taxation of Pope *Nicholas*, the churches of *M. St. Peter* and *M. St. Mary* were valued separately. In the *Nonarum Inquisitiones*, it is mentioned as one parish, in which the two churches were taxed conjointly. Other early records were set out which were ambiguous.

Held: that the proof of modern usage shewed that *M.* was a reputed parish at the time of the passing of stat. 43 Eliz. c. 2.; and, that being so, even if it was really not the parish, the rate could not now be disturbed.

Seem: that the evidence tended to shew that *M.* had been from time immemorial one parish, with two churches.

namely the parish of *Mablethorpe St. Mary* and the parish of *Mablethorpe St. Peter*; each of which ought to maintain its poor separately, and to appoint separate overseers of the poor, and levy separate rates for their relief. The respondents contend that, long before and at the time of passing of stat. 43 *Eliz. c. 2.*, *Mablethorpe* was either actually, or by reputation, a parish, and was therefore entitled to have overseers appointed for it, and to maintain the whole of its poor, whether resident in one part of the parish or another, from one common fund. Neither of the alleged parishes of *Mablethorpe*, *St. Mary* and *St. Peter*, so far as evidence can be procured, has ever maintained its poor separately; but one rate has always been made for the whole of the alleged parish of *Mablethorpe*; and the poor of the alleged parishes of *St. Mary* and *St. Peter* have been jointly and indiscriminately relieved out of such rate, as one common fund, ever since the passing of stat. 43 *Eliz. c. 2.* There is no evidence tending to shew that, at any time, the alleged parishes of *St. Mary* and *St. Peter* ever respectively appointed overseers, or levied rates for the relief of their poor. Two overseers have yearly been appointed for the whole of the alleged parish of *Mablethorpe*. The district, containing both *St. Mary* and *St. Peter*, has usually been called in such rates the parish of *Mablethorpe*; but the rate for 1777 purports to be made for the town of *Mablethorpe*. The churchwardens of the church of *St. Mary* have acted as overseers of the poor of the whole of *Mablethorpe*. As far as evidence goes, one constable only has ever been appointed and acted for the whole of the alleged parish of *Mablethorpe*. The constable's account in the parish chest of *Mablethorpe St. Mary*, commencing with the year 1706, describes that officer as constable of the town of

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Mablethorpe. The roads of *St. Mary* and *St. Peter* always been maintained, as far as evidence goes. The rate made for the parish of *Mablethorpe*, as in the the poor rate. And the surveyors of the highway always been selected indiscriminately from the tenants of *St. Mary* and *St. Peter*, and appointed justices to serve the office of surveyors of the highway for the whole of the alleged parish of *Mablethorpe* including both districts. A few certificates of settlement and bastardy bonds yet exist in the parish church of *Mablethorpe St. Mary*, given to the overseers of the parish of *Mablethorpe*. The oldest is dated 26th of March 1711. In all county records (which only go back 100 years) preserved in the office of the clerk of the peace, such as jurors' lists and county rates, there is no mention of any parish but that of *Mablethorpe*. In modern indictments it is the same. *Mablethorpe St. Mary* and *St. Peter* were, by order of The Poor Law Commissioners bearing date the 18th of March 1834, when the *Louth Union* was constituted, included in the union, and described in the margin thus "36: *Mablethorpe St. Mary* and *St. Peter*;" and one guardian only has been appointed or acted for both: this order has been acquiesced in by the inhabitants of both. *Mablethorpe St. Mary* contains one thousand seven hundred and eighty acres of land, thirty four houses, and a population of about two hundred and sixty one. *Mablethorpe St. Peter* contains one thousand and four hundred and fourteen houses, and a population of about sixty two. The *Calendarium Inquisitionum Post Mortem*, in the reign of *Edward 1.* are these entries: "*Henr' de Saltfild Malberthorpe. terr. &c. (a).*" "*Philip de Kyme ten*

(a) 6 Ed. 1. Inquisition after the death of *Henr' de Saltfild*, *Calendarium Inquisitionum Post Mortem*, vol. 1. p. 63.

Malberthorpe, 14 feod" (a); and in the reign of *Edward 2.* there are three entries of a like nature, where *Malberthorpe* is named as before, without distinction of *St. Mary* or *St. Peter* (b). In Pope *Nicholas's* Taxation, A. D. 1291, under the head *Decanatus de Calsewath*, appears "*Ecclesia de Malberthorp Sci Petri*, 4l. 6s. 8d. *Ecclesia de Malberthorp Scæ Mariæ* 8l. (c)." In the *Nonarum Inquisitiones* (d), A. D. 1341, under the head "*Decanatus de Calsewath*," is the following entry: "*Malb'thorp*." The two churches are taxed conjointly (conjunctim). The same assessors render account for thirteen pounds reserved from the ninth of the beeves, fleeces and lambs, of the parish of *Malb'thorp*, the two churches whereof are taxed ("*agnorum parochiæ de Malb'thorp, cujus quidem ecclesiæ taxantur*") at eighteen and a half marks, as appears by the inquisition taken by the oath of *Alan Ward*, &c. and others their fellows of the parish aforesaid, jurors ("*et aliorum sociorum suorum parochiæ prædictæ juratorum*"). Of the two churches of the alleged parish of *Mablethorp*, so mentioned in the *Nonarum Inquisitiones*, one was destroyed shortly before the year 1526, and has not been rebuilt, although Lord *Willoughby de Eresby*, the patron of that church, by his will, dated in that year, directed as follows. Item. "I will that my executors shall, in as conveyent and shorte tyme as possible canne, purchase as much lande as shall be necessary for the buylding and setting upp of a new church, and church-yard, to be made and holie buylded at my cost and charge, to the value of cc marks, within the towne of *Malberthorpe* in the county of

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(a) 25 *Ed. 1.* Inquisition after the death of *Edmund Earl of Lancaster*. *Calendarium Inquisitionum Post Mortem*, vol. 1. p. 143.

(b) In 10 *Ed. 2.* vol. 1. pp. 286, 287; in 14 *Ed. 2.* vol. 1. p. 296.

(c) P. 59.

(d) P. 269.

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Lincoln, and that to be paid by my executors or issues, revenues, and profits of all my said manor land and tenements, those I have appointed for executions of this my last will, in consideration I my selfe take to my owne use all such lease the said church was coveryd w^h of w^h church patrone." The *Valor Ecclesiasticus* (a), 26th *Henry* under the general heading *Malb'thorpe*, contain separate valuation of the two rectories of *St. Peter* and *St. Mary*. The several institutions to the Rectories, *St. Peter* and *St. Mary*, are separately recorded in the book of Institutions, remaining in the registry of the Bishop of *Lincoln*. On the 27th *January*, A.D. 1491, *Edward Strangeways* was instituted to the rectory of *Mablethorpe St. Mary*; and on the 11th *November*, in the same year, *Thomas Kyrkeman* was instituted to the rectory of *Mablethorpe St. Peter*. From this period the institutions to the rectory of *Mablethorpe St. Mary* are continued to the year 1687, after which time it was legally united to the adjoining rectory of *Staine*; and, from the year 1687 down to the institution of the present incumbent, the Rev. *Thomas Lovick Cooper*, on the 9th of *August* 1831, the benefice to which the several rectors were instituted, is described as *Mablethorpe St. Mary with Staine*. The institutions to the rectory of *Mablethorpe St. Peter* are continued in the same form, from the year 1491 down to the year 1745; but in the institution of the next succeeding rector, in the year 1761, the benefice is described as *Theddlethorpe St. Helen with Mablethorpe St. Peter*, and is so continued until the institution, on the 6th of *December* 1810, of the Rev. *Payne Edmunds*, the present incumbent. In the year 1737 *Peregrine Duke* of

(a) Vol. 4. p. 59.

caster, being the patron of *Mablethorpe St. Peter*, and also of the rectory of *Theddlethorpe St. Helen*, and the Rev. *Robert Owen* being incumbent of both, a deed of union, bearing date the 26th day of *October* in that year, was duly executed by the then Bishop of *Lincoln*; which contain the following recitals: "Whereas it has been represented unto us by your respective petitions that you, the said most Noble *Peregrine Duke of Ancaster and Kesteven*, have in your own right the perpetual advowson of the said parish church of *Theddlethorpe St. Helen* and rectory of *Mablethorpe St. Peter* of which church, rectory and parishes you the said *Robert Owen* are rector, and that the said parishes of *Theddlethorpe St. Helen* and *Mablethorpe St. Peter* are contiguous to each other, and the parishes very small, the said parish church of *Mablethorpe St. Peter* many years since demolished by the violence of the seas, and the parishioners thereby destitute of a place for their public worship, and that the tithes, profits, oblations and obventions yearly arising and accruing within the said parishes were of so small value that they were not sufficient duly to maintain and support two several ministers, and, if united, would not yield more than a competent provision for the support and maintenance of one worthy minister: And whereas, in your said petitions, you have earnestly besought us that we would, for the better service of the cure of the said parishes, and sufficient and competent provision, support and maintenance of a fit and worthy minister, by our episcopal authority unite, annex and consolidate the rectory of *Mablethorpe St. Peter*, with all its rights, members and appurtenances, to and with the parish church of *Theddlethorpe St. Helen*, and to add the cure of souls of the said parish of *Mablethorpe St. Peter* to the said parish of

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Theddlethorpe St. Helen, and to do and perform other matters and things, necessary and requisite to done and performed, so that the said church and rectory may be taken, accounted and reputed to be but one rectory, now and hereafter, that one minister may presented and admitted to the same whenever the same shall become void, as unto one entire rectory." This deed then purports to unite and consolidate the rectory of *Mablethorpe St. Peter* with that of *Theddlethorpe St. Helen*, and to add and annex the cure of souls with the said parish and rectory of *Mablethorpe St. Peter* to the parish church and incumbent of the parish church of *Theddlethorpe St. Helen*. This deed was not executed by the then incumbent, nor any churchwardens, and the legality of the union it purports to effect is disputed; nor was it acted upon in the institution which next followed; inasmuch as, on the 21st of May 1744, *John Bland* was instituted as rector to the benefice vacant by the death of *Owen*, of *Mablethorpe St. Peter* alone, according to the form of previous institution. Nevertheless, as before stated, the three institutions succeeding that of *Bland*, down to that of the present incumbent, are to the benefice of *Theddlethorpe St. Helen with Mablethorpe St. Peter*; and the tithes of *Mablethorpe St. Peter* have been enjoyed by such incumbents so instituted, as they had always previously been by the rector of *Mablethorpe St. Peter*. In the books of institutions, both *Mablethorpe St. Peter* and *Mablethorpe St. Mary*, respectively, are frequently described as parishes, and frequently as *Mablethorpe St. Mary*, or *St. Peter*, omitting the word parish. The inhabitants of the alleged parish of *Mablethorpe St. Peter*, so far as evidence exists, have not contributed towards the repair of the church situate in the alleged

parish of *Mablethorpe St. Mary*: but the church rate that has occasionally been made for the repair of such church has been assessed on the occupiers of land wholly situated in the *St. Mary's* part of the parish, and on such occupiers alone. The tithes of the rectory of *Mablethorpe St. Peter* have been separately commuted under the Tithe Commutation Act, and are paid to the rector of *Theddlethorpe St. Helen with Mablethorpe St. Peter*. The tithes of *Mablethorpe St. Mary* have also in like manner been commuted, and are paid to the rector of *Mablethorpe St. Mary with Staine*. There are no parochial registers existing of earlier date than the year 1650; the oldest which is deposited in the church of *St. Mary*, being entitled "A register of all the christenings, marriages and burials within the parishes of *Mablethorpe St. Mary and St. Peter* from the 26th of *March* 1650." The modern register now in use is headed "*Mablethorpe St. Mary and St. Peter*, in the diocese of *Lincoln*, 1810." The entries in these registers frequently make a distinction between the two places, and describe the parties as of the parish of *Mablethorpe St. Mary*, or of the parish of *Mablethorpe St. Peter with Theddlethorpe St. Helen*, as the case may be. Two churchwardens were, from 1601 down to 1712, appointed for *Mablethorpe St. Mary*, but one only for *Mablethorpe St. Peter*. Since 1712, only one has been appointed for *St. Mary*, and, since 1834, none for *St. Peter*. The question for the opinion of the Court is: "Whether, upon the grounds above mentioned, *Mablethorpe St. Mary* and *Mablethorpe St. Peter* ought by law to appoint separate overseers, maintain and manage their own poor separately, and have separate rates and assessments levied on them for

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that purpose. It is agreed by the parties that the shall have all the power to draw inferences and conclusions from the facts above stated, which a jury, upon trial of a civil action, would have. If the Court be of opinion that these places ought by law to appoint separate overseers, and maintain their poor separately, then this rate to be quashed. If the Court show a contrary opinion, the rate to be confirmed.

Pashley, in support of the rate. The law upon this subject was considered in *Regina v. Clayton (a)*. The conclusion there is that, where the ecclesiastical separation is complete, the two districts may be separate parishes, but not that they necessarily must be. It is not material in the present case, whether the two districts in this case really have been from time immemorial one parish, or whether if they were de facto one reputed parish at the time of the stat. 43 *Eliz.* c. 2. passed it is enough. In *Dalton's Journal of the Peace*, p. 165. ch. 73 (ed. 1742), it is said that there be an ancient parish, and an ancient village within that parish; which village had an ancient church, and those within that village have had parochial rights, and chosen churchwardens and overseers of the poor, and have been separately taxed ever since 43 *Eliz.* for the relief of the poor within that village; this is a case within 43 *Eliz.* 2. and taxes may be made and levied within themselves. And all this was resolved in a case between *Hilton* and *Paule*, upon a special verdict between the parish of *Hinkley* in the county of *Leicester*, and the village of *Stoke-Goldingham* within that parish. *Car.* 92. And the like was also resolved *Trin.* 10 (a) between *Nichols* and *Walker*, between the parish

(a) 13 Q. B. 354.

Hatfield and the village of *Tatridge*, 1 *Jones*, 355., and *Cro. Car.* 394.” And the cases to which he refers, *Hilton v. Pawle* (a) and *Nichols v. Walker* (b), fully bear out his statement. It is true that these were cases where the reputed parish was a smaller part of the true one, whilst here, according to the appellant’s case, the reputed parish consists of two true ones; but that makes no difference in principle. There is, however, very strong evidence that *Mablethorpe* really was from time immemorial one parish, with two churches in it. It is probable, though only a conjecture, that the origin of the two churches was that one was the chapel belonging to the nunnery; but, however this may be, the entry in the *Nonarum Inquisitiones* shews that at that time the parish was treated as one parish, with two churches, and that the inquest was chosen from the parish at large.

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Boden, *contra*. The inference from the evidence is, that the two rectories were always separate parishes. The mere fact that they are rectories goes far to shew it. There is no legal method by which two parishes can unite. [Lord *Campbell* C. J. But suppose that two distinct parishes had, within legal memory, come to be treated as one, and continued to be so treated and reputed down to the time of 43 *Eliz.*, and had ever since been treated as one under the poor law. How would the law be then?] Mere user cannot unite them. The cases cited are cases where a vill had become a parish by repute; there is no case in which two parishes have been held to be united. But there is no evidence that,

(a) *Cro. Car.* 92.(b) *Cro. Car.* 394; *S. C.* 1 (*W.*) *Jones*, 355.

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Queen *Elizabeth*.

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Pashley was heard in reply.

Lord CAMPBELL C. J. I am of opinion that this must be confirmed. I can see no sufficient legal ground for disturbing a usage which has prevailed so long. The evidence as to the ancient state of the parish is ambiguous, as, though there is evidence that they were two parishes, there is also evidence that there was from immemorial one parish with two churches; the documents, from which it appears that the churches were rated together, and *Mablethorpe* described as one parish, are strong evidence that way. But I think it enough at the time when stat. 43 *Eliz. c. 2.* came into operation they were reputed to be one parish. If they then continued as one parish, and have continued to act as such, their practice cannot be disturbed; for stat. 43 *Eliz. c. 2.* intended to cast the obligation of maintaining their churches on those districts then considered to be parishes, without throwing upon the inhabitants the necessity of antiquarian research to ascertain whether those districts were from time immemorial were parishes or not. That I think, the result of the early authorities: and I construe them as it is a reasonable construction of the statute. Then, as a matter of fact, I have not the least doubt that these two districts were treated in the time of *Elizabeth* as one parish. We find one poor rate, one set of overseers, in short, for all temporal purposes, one parish, as far back as modern evidence goes. I think, though we cannot call from his grave some one to tell us what was the practice in the time of *Elizabeth*,

the uniform practice as far as it can be traced evidence that it was the same then? I think so; and therefore I think there should still be one rate.

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ERLE J. I also come to the same conclusion. I infer that the facts are such that this rate should be supported. I do not find any clear evidence to convince me that there ever were two parishes. The two are spoken of as separate in early records; but, in very early times, so early that parishes were still almost in the course of formation, we find *Mablethorpe* spoken of as one parish with two churches. And, whatever might be their state as to ecclesiastical matters, this is a question as to civil rights; and as far back as living memory goes these rectories have for civil purposes been treated as one parish: and I see no reason to think that they are not one.

CROMPTON J. I am of the same opinion, that this is one parish for the purposes of stat. 43 *Eliz. c. 2*. After the long usage, and considering the other evidence, more particularly the fact that the highways have been kept up as if the parish was one, and the old entry in the *Nonarum Inquisitiones*, I should, notwithstanding the other evidence, draw the conclusion of fact that this was from time immemorial one parish, if that finding were necessary to support the usage. But I incline to think it enough if it was so reputed at the time of the passing of stat. 43 *Eliz. c. 2*. The decisions so soon after the statute are weighty authorities on its own construction. Even if I thought them wrong, I should not break in upon that wholesome rule by which the contemporaneous construction of a statute has great weight. And, though

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it is true that, in the cases referred to, the reputed was part only of a real parish, I can see no difference in principle between a reputed parish consisting of less than a real parish, and a reputed parish consisting of more than a real parish. I wish to speak with diffidence on a part of the law with which I am not familiar, rather rest on the inference of fact which I am permitted to draw, that this always was one parish.

(No fourth Judge was present.)

Rate a

Friday,
June 14th.

FREDERICK STANLEY CARPENTER *against*
MURE and ROBINS, Executors of
THOMAS CARPENTER.

M., being seized in fee, devised to her daughter E., to hold to E., her heirs, executors, administrators and assigns, for and during the natural lives of E., E.'s husband, and their daughter, and of the survivor; and in case the three

A SUMMONS having been issued, at the suit of the plaintiff, against the defendant, by consent of the parties, and by the order of *Erle J.*, a case was put for the opinion of this Court, under The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76.) in which case, so far as is material to the present decision, was as follows.

Dame Margaret Stanley, widow, was, at the death of her husband, the defendant, the executrix of his will, and execution of the second codicil to her will, her husband's will, was as follows.

Held that E. having died before the other two lives expired, her heir took the property in fee.

set out, and thenceforth continued and was at the time of her death, seised to her and her heirs for an estate of inheritance in fee simple of and in certain messuages, lands and hereditaments, situated in the parish of *Holyhead* in the county of *Anglesey*. She duly made and published her last will and testament in writing, and the several codicils thereto hereinafter mentioned. The will and codicils were respectively executed and attested in such manner as required by law for passing freehold estates by devise.

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The will was dated 12th *August* 1812. The first codicil was dated 27th *June* 1815. But neither the will nor the first codicil relate to the dispute between the plaintiff and the defendants.

The second codicil was dated 8th *September* 1815, and was as follows.

"This is a second codicil to my will; which will bears date the 12th day of *August* 1812. I give, devise and bequeath to my daughter *Emma Carpenter* all that messuage or tenement, with the appurtenances," &c., "situate" &c., "these said premises &c. &c. I do hereby give, devise and bequeath to my said daughter *Emma Carpenter*; to hold to her, her heirs, executors, administrators and assigns, for and during the term of the natural lives of herself, the said *Emma Carpenter*, *Digby Thomas Carpenter* Esquire, her husband, and *Margaret Anne Carpenter*, their daughter, and the natural lives and life of the survivors and survivor of them. And, in case the said *Emma Carpenter*, *Digby Thomas Carpenter* and *Margaret Anne Carpenter* should all depart this life before the expiration of thirty one years, to be computed from the day of my decease, then to hold the said messuage or tenement," &c. "unto the executors,

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administrators and assigns of the said *Emma Carpenter* for and during the said term of thirty one years, computed from the day of my decease." Other was devised with precisely the same limitations. "I do hereby give, devise and bequeath the reverses of the aforesaid messuages or tenements," &c., "to my grandson *William Owen Stanley*, the second son of my son *Sir John Thomas Stanley*, Baronet, and to the male of the said *W. O. Stanley*, lawfully issuing; in default or failure of such issue, to the use of the fourth, fifth, sixth and all and every other son and of the said *Sir J. T. Stanley*, lawfully begotten, severally and successively in remainder, one after another, as and every of them shall be in seniority of age and priority of birth, and of the several and respective male of the body and bodies of all and every such sons, lawfully issuing, the eldest of such sons, the heirs male of his body, lawfully issuing, being always to be preferred and to take before the younger of such sons, and the heirs male of his or their body or bodies lawfully issuing; and, in default of such issue, to the use of my grandson *Edward John Stanley*, eldest son of my son *Sir J. T. Stanley*, and the heirs and assigns of the said *E. J. Stanley* for ever."

The third codicil was dated 8th September 1815, does not relate to the dispute between plaintiff and defendants.

The testatrix died some time in the year 1816 without having altered or revoked her will and codicils, and the same were duly proved on 6th July 1816, in the Prerogative Court of the Archbishop of Canterbury by *Sir J. T. Stanley*, Baronet, her son and executor.

At the time of the death of the testatrix, the said *Emma Carpenter*, her husband the said *Digby Thomas Carpenter*, and their daughter the said *Margaret Anne Carpenter*, were all living. And the said *Emma Carpenter*, or the said *Digby Thomas Carpenter* in her right, from that period received the rents and profits arising from the messuages, lands and hereditaments devised by the said second codicil, until her death, which happened in *August 1842*, *Digby Thomas Carpenter* and *M. A. Carpenter* being then alive.

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Emma Carpenter made no disposition, by will or codicil, of the messuages, lands or hereditaments devised by the said second codicil of the said Dame *Margaret Stanley*. The case stated that she executed by will a power of appointment, given by her marriage settlement, over certain funds, but appointed no executor; and, her husband renouncing, letters of administration cum testamento annexo, so far only as concerned the funds which she could dispose of by her marriage settlement, were, on 4th *June 1851*, granted to her son, a principal legatee under her will.

From and after the death of *Emma Carpenter*, her husband, the said *Digby Thomas Carpenter*, received the rents and profits arising from the messuages &c. devised by the second codicil until his death, which happened in the month of *September 1853*, his daughter the said *Margaret Anne Carpenter* being then and still alive.

The case stated that *Digby Thomas Carpenter*, on 20th *June 1853*, by will duly executed and attested, devised and bequeathed all the estate and interest to which at the time of his decease he might be entitled of and in the messuages, &c., which were the subjects of

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the devise in the said second codicil, to and to the
 of the plaintiff in fee, and appointed the defendants
 executors.

The plaintiff takes no other interest under his father's
 will: and the same was duly proved, on 20th October
 1853, in the Prerogative Court of the Archbishop
Canterbury, by the defendants.

The plaintiff is the only son and heir at law of his
 mother, the said *Emma Carpenter*.

The questions for the opinion of the Court are:

First: What estate or interest (if any) passed to the
 plaintiff under the second codicil to the will of the said
 Dame *Margaret Stanley*, upon the death of his mother,
 the said *Emma Carpenter*.

Second: What estate or interest (if any) passed to
 the plaintiff under the will of his father, the said *Digby*
Thomas Carpenter, of and in the messuages, lands and
 hereditaments devised by the second codicil of the said
 Dame *Margaret Stanley* (a).

The plaintiff and defendants agree that such judgment
 shall be entered for or against the plaintiff, or for
 against the defendants, immediately after the decision
 of this case, as the Court may think fit: and that judgment
 shall be entered accordingly, and, if the plaintiff
 succeeds, for such sum as the plaintiff and defendants
 shall mutually agree upon.

L. H. Bayley, for the plaintiff. The plaintiff is
 entitled to the land as special occupant. The codicil
 very inartificially framed: and the Court must give
 effect to it so far as legal rules admit. If the will

(a) This question was not discussed.

“executors, administrators and assigns” did not occur, the devise would be to *Emma Carpenter*, to hold to her and her heirs for three lives and the life of the survivor. The effect of a conveyance with such a limitation is discussed by *Vaughan C. J.* in *Holden v. Smallbrooke* (a); and he there considers that the heir takes, not as a special occupant, but by descent as heir of a descendible freehold; and *Vaughan* refers to *Bracton*, lib. II. c. 9. fol. 26 b, 27 a. This form of gift was, it thus appears, known very early. The modern view is that the heir takes as special occupant; but in either view the heir takes; *Litt. sect. 739.*; *Com. Dig. Estates* (F 1.); *Doe dem. Blake v. Luxton* (b), *Doe dem. Jeff v. Robinson* (c), *Doe dem. Lewis v. Lewis* (d). [*Fortescue*, for the defendants, admitted this.] The question then arises upon the addition of the words “executors, administrators and assigns.” These appear to have been added from a superfluous caution, and must be disregarded. If a man covenant for himself, his heirs, executors and administrators, the words “executors and administrators” are inoperative, since the personal representatives are liable upon a covenant without being named: and the case is not like that of words which, when joined to preceding words, affect and qualify the latter, as is the case when “of his body” is added to “heirs.” The effect which it is sought, on the other side, to attach to the words can be given only by striking out the word “heirs” altogether: if that could be done, the land would no doubt go to the executors, who would hold as trustees for the next of kin. An argument will be suggested from the limitation over. In the event of the

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(a) *Vaughan*, 187. 201.(b) 6 *T. R.* 289. 292.(c) 8 *B. & C.* 296.(d) 9 *M. & W.* 662.

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expiration of the lives within thirty one years after decease of the devisor, the land is given, for the rest of the thirty one years, to the executors, administrators and assigns of *Emma Carpenter*. The thirty one years have expired before the lives, so that the limitation is not taken effect: but an inference will be suggested from its language. The word "heirs" does not occur there: but no inference can be drawn from its omission tending to shew that the word "heirs" in the preceding clause must be neglected or qualified; for, if the word were inserted in the later clause, the limitation for years to the heir would give him no estate; the executors would still take; *Litt. sect. 740*. The difference in the wording of the two clauses does, however, shew that the word "heirs" was designedly introduced in the first. But the later clauses are very loosely worded. It may be observed that the limitation could take effect only in an executory bequest; and then it is void because it cannot be postponed to a time more remote than the expiration of lives in being at the time of the devisor's death: twenty one years after, as, for instance, if all the lives expired within a year of the devisor's death. This is laid down in *Cadell v. Palmer* (a). So also the remainder over, called "reversion," is void. In the present place, treating it as a contingent remainder, or series of contingent remainders, it is void for want of a freehold to support it; *Fearne's Cont. R.* 281. But, further, it is properly an executory devise, as limited after an executory devise; *Fearne's Cont. R.* 503.; and therefore it fails for remoteness, like the preceding one. But, independently of these objections, no inference from

(a) 1 Cl. & F. 372.

later clauses can safely be drawn affecting the express language of the first clause. The general principle is laid down in 2 *Jarman on Wills*, 742. : "That an express and positive devise cannot be controuled by the reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will." This is borne out by the language of Lord *Brougham C.* in *Thornhill v. Hall* (a) and the judgment in *Williams v. Evans* (b). In *Atkinson v. Baker* (c) the limitations were like the present; and it was held that the heir took as special occupant. That was, indeed, the case of a deed; but the argument as to change of purpose is the same. It is impossible to suppose that the devisor changed her mind after writing the word "heirs" and before she wrote the word "executors," the two occurring in one sentence.

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Fortescue, contra. It is true that the codicil is very inartificially framed: all that can be done is to ascertain, as far as possible, the devisor's intention. If the devise had stopped at the word "heirs," the plaintiff would have been entitled: and, if this had been a deed, then, according to *Atkinson v. Baker* (c), the addition of the words "executors, administrators and assigns" would not have destroyed his title. But this is a will, and must be interpreted so as to give effect to all the intentions of the devisor, so far as they are consistent, and, when they are not so, to her last intentions. The limitations over create contingent remainders, and are not executory bequests. If they were executory

(a) 2 *Cl. & F.* 22. 36.

(b) 1 *E. & B.* 727.

(c) 4 *T. R.* 229.

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bequests, they would be void, which, of course, was the intention of the devisor. And they do not take effect in defeazance of prior estates, but take effect on the expiration of these. If there had been a forfeiture of the life estate, the subsequent limitations would have failed. As to the intention of the devisor: her daughter *Emma Carpenter*, is the first object of her bounty; this daughter is named as the first life. The second is that of the daughter's husband, the person who, in default of a will, would take in right of his wife; the third life is *Margaret Emma Carpenter*, the daughter of *Emma Carpenter*; from which it may fairly be inferred that the devisor looked upon her, rather than upon the son of *Emma Carpenter*, the now plaintiff, as intended to take; if she had meant the son to take, he would have been named as one of the lives; his life was a better security than that of *Emma Carpenter* or her husband. If *Emma Carpenter* had survived the other two, she would have been tenant for life; she could not have taken to herself and heirs for her own life; if she had died within the thirty one years, the land must have gone to her executors. An executor may be a tenant in common as well as an heir may: there is no preference in law in favour of one rather than the other. Should the earlier words have preference over the later, [Lord Campbell C. J. If you find a limitation in a will at variance with an earlier limitation, you give effect to the earlier one: if this occurs in the case of a will, you give effect to the later one, assuming this to show the last intention of the devisor. But that applies to distinct clauses: here there is a single clause, and the question is, What did the devisor mean by the words there used?] "Heirs" is probably used in the

sense, as designating successors. *Littleton*, in sect. 740, appears to treat the word "heirs" as equivalent, in the particular instance, to personal representatives. The devise over, in the event of the three lives expiring within the thirty one years, is expressed to be, not of the residue of the term of thirty one years, but of that term itself: and it seems to follow that the whole interest was thus looked upon as a chattel interest. Had the heir of *Emma* been an object of the deviser's bounty, he, or his executors, and not those of *Emma*, would have been made to take the term.

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L. H. Bayley, in reply. It is not of much consequence, whether the limitations over be construed as executory devises or as contingent remainders. The estate is limited absolutely for the thirty one years: after that, it devolves in different courses according to two states of things.

Lord CAMPBELL. C. J. We are called upon to explain a very inartificial clause, such as we are not likely to meet with again. The question is, Whether, the land being given to *Emma* and her heirs *pur auter vie*, her heir is not entitled to take as special occupant. He certainly is so entitled, unless you can strike out the word "heirs:" it must go to him, if you give effect to the word. Had we found any subsequent clause inconsistent with this view, we might take a liberty with the word, and mould it, which has sometimes been done rather freely, but which, I think, should be done abstinently. But I do not think that Mr. *Fortescue* has pointed out any such inconsistency. If this were a

1854. deed, *Atkinson v. Baker* (a) would be decisive in favour of the plaintiff: and, so far as the present question concerned, I see no difference between a deed and a will. In the case of separate clauses, which are inconsistent, you give the preference to the earlier clause, a deed and to the later in a will: but here the question does not arise upon separate clauses, but upon a single clause, which must have a single meaning; and the question is, What that single meaning is. I think the meaning was that the heir should take.

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ERLE J. I am of the same opinion, on the ground that we are to construe a will according to the words which we find in it. The land is given to *Emma Carpenter* and her heirs for three lives. Is her heir to take if she dies before the expiration of the three lives? We must do so, unless the word is to be struck out. I supposed that this will defeat some other limitation. It does not appear to me that Mr. *Fortescue* has shown that it will do so. But, if we had conflicting limitations still, there being one which is clear, we must adhere to it unless the limitations supposed to conflict with it were equally clear. Now the intention to give to the heir is here, at least, more clear than an intention to give to the executors; for, when we look at the limitation which follows the first, we find "executors" are mentioned but "heirs" left out; that it is manifest that the deviser, in using the word "heirs," selected it as clearly designating something distinct from "executors."

(a) 4 T. R. 229.

CROMPTON J. I am quite of the same opinion. We cannot reject words which are inserted expressly. The devisor gives an estate which is partly freehold, and then goes on to give other estates. It is said that other limitations shew that she meant to give this latter to the executors. But there is much force in the observation that she must mean "heirs," when she uses that word, inasmuch as she afterwards omits it when she is giving an interest to executors. And it may be further observed that, when she comes to create a freehold estate again, she again uses the word "heirs." We therefore cannot reject that word; and, if we do not, the rest follows.

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(No fourth Judge was present.)

Judgment for the plaintiff.

CHURCHILL *against* SIGGERS.

Friday,
June 9th.

THE declaration alleged that plaintiff, at the request and for the accommodation of *Mary Ann Helps*, accepted two bills of exchange, drawn by her, payable to her order, for 68*l*. and 32*l*. 10*s.*, respectively; that *M. A. Helps* indorsed them in blank; and defendant, Where it appears by the declaration that defendant has recovered a judgment for debt and costs, against plaintiff, and has issued a ca. sa. indorsed to satisfy the whole of such debt and costs, and afterwards the debt itself has been satisfied (as where the judgment is recovered by the holder of a bill of exchange against the acceptor, and the drawer, for whose accommodation the bill had been accepted, pays to the holder the amount due on the bill), so as to reduce the sum remaining due on the judgment to a sum below 20*l*., and that afterwards the defendant has delivered to the sheriff's bailiff a warrant indorsed to satisfy the whole debt and costs, and has procured plaintiff to be arrested to satisfy the whole, and there is an allegation of malice and want of probable cause, and of special damage, by means of the premises, in the plaintiff being prevented from attending to his business, being injured in his credit, and incurring expence in procuring his liberation by a Judge's order, such facts shew a good cause of action.

So held, on demurrer to the declaration.

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knowing them to be accommodation bills, discount them for her, and became the legal holder thereof. That afterwards *M. A. Helps* intermarried with *John Kinder Cheese*. That thereupon, and after the bills became due, defendant commenced, in the Court of Queen's Bench, two separate actions on them, one against plaintiff as acceptor, the other against *J. K. Cheese* and his wife by reason of the wife having been before marriage, drawer and indorser. That defendant recovered against plaintiff the amount of the two bills to wit 100*l.* 10*s.*, and 48*s.* for interest, together with 12*l.* 4*s.* for costs; in all, 115*l.* 2*s.*; and caused a writ *ca. sa.* to be issued on the judgment, directed to the sheriff of *Middlesex*, commanding them to take plaintiff &c., to satisfy the defendant 115*l.* 2*s.*, with interest from the day of the judgment: which writ was indorsed with a direction to levy 115*l.* 2*s.*, together with the said interest; and defendant delivered the writ to the sheriff; who, before the return, directed their warrant to certain bailiffs, commanding them to take plaintiff &c.: that the warrant was not executed during the sheriff's shrievalty, and became of no force. That, after the granting of the said warrant, defendant caused to be issued in the action against *J. K. Cheese* a capias directed to the sheriff of *Surrey*, commanding him to take *J. K. Cheese*, and keep &c., until he should have given bail, or made deposit, or by other lawful means be discharged from custody: which writ was delivered to the said sheriff to be executed, having been previously indorsed for bail for 100*l.*, by order of *Crompton J.*, the sum of 100*l.* 10*s.* being the amount of the two bills: that the sheriff arrested *J. K. Cheese* and detained him in custody; and *J. K. Cheese*, with

so in custody, paid to defendant, "who then took and accepted the same from him, the sum of 110*l.* 10*s.*: that is to say, the sum of 100*l.* for the debt in the said action as aforesaid, and for which the said *J. K. Cheese* was so authorized to be held to bail as aforesaid, and the sum of 10*l.* 10*s.* for the costs and charges in such action and incidental thereto. And thereupon the whole of the plaintiff's (a) said causes of action against the said *J. K. Cheese*, to wit on the said two bills of exchange, was then fully paid, discharged and satisfied, as the defendant did then acknowledge and admit." "That, after the said causes of action were so fully satisfied as aforesaid, and after the said warrant on the said *capias ad satisfaciendum* so obtained from the said sheriff of *Middlesex* had expired, by reason of the then shrievalty having expired, "the defendant, falsely, maliciously, and without any reasonable or probable cause whatever, caused and procured" the succeeding sheriff of *Middlesex* "to make and grant their certain other warrant in writing, under their hands and seal of office, as such sheriff, upon the said writ of *capias ad satisfaciendum* which had so remained unexecuted as aforesaid, and which the now defendant had so issued against the now plaintiff as aforesaid, directed to certain bailiffs of the last mentioned sheriff, commanding such bailiffs to take the now plaintiff and him safely keep," &c., "to satisfy the now defendant the said sum of 115*l.* 2*s.* so recovered against him as aforesaid; which said warrant was then indorsed with a direction to the said bailiffs to levy such sum of 115*l.* 2*s.*: and thereupon

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(a) Sic: probably meaning the plaintiff in *Siggers v. Cheese*, defendant in the principal case.

1854. the now defendant, falsely and maliciously, and without any reasonable or probable cause for so doing, caused and procured the said last mentioned warrant to be delivered to such bailiffs, and, falsely and maliciously, and without any reasonable or probable cause, caused and procured the said bailiffs to arrest and take the plaintiff by his body upon the said warrant to satisfy the defendant the said sum of 115*l.* 2*s.*, so pretended to be then due to him as aforesaid." That defendant was accordingly, on 22d *December* 1852, taken and imprisoned on such warrant, "and lodged accordingly in Her Majesty's Debtors' Prison for *London* and *Middlesex*, and there kept and detained for a long time, upon and by virtue of such last mentioned warrant, to wit four weeks, until the plaintiff could procure his discharge from such custody by applying to Sir *Charles Crompton*, Knight, one of the Judges of the said Court, who then made an order that the plaintiff should be discharged out of such custody." "That, at the time when the defendant so, maliciously, and without any reasonable cause, caused him to be imprisoned as aforesaid upon the said *capias ad satisfaciendum*, the judgment upon which such writ was founded was a judgment obtained in Her Majesty's Court of Queen's Bench as aforesaid upon a debt amounting, to wit, to the aggregate of the said two bills of exchange as aforesaid; and that such debt was the only sum recovered in such action, exclusive of the costs recovered by such judgment: and that, at the time of such arrest and imprisonment of the plaintiff as aforesaid, such debt did not exceed the sum of 20*l.*, exclusive of the costs recovered by such judgment. And the plaintiff further saith that, by means

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of the premises, he not only was prevented from attending to his affairs and business, and was injured in his credit and character, but also, by means of the premises, he was put to and incurred great costs and expences, to wit to the amount of 50*l.*, in and about procuring his liberation and release from the said imprisonment."

Demurrer. Joinder.

The case was now argued (*a*).

Ogle, for the defendant. It is by no means clear what cause of action is intended to be set up by the declaration. The complaint might be either for arresting for a sum under 20*l.*, or for arresting for a larger sum than was really due. The first, however, cannot be maintained, because stat. 7 & 8 *Vict. c. 96. s. 57.* applies only where the sum recovered does not exceed 20*l.*, exclusive of costs; and here the sum recovered was 100*l.* 10*s.*, with 2*l.* 8*s.* interest, exclusive of costs. Then, assuming the complaint to be that, the payment by *Cheese* having satisfied 100*l.* of the debt on which the judgment against the plaintiff was recovered, the ca. sa. and warrant against the plaintiff were indorsed for 115*l.* 2*s.*, with interest, and the plaintiff taken on the warrant so indorsed; the question is whether that shews a right of action. It is not shewn that the plaintiff has been damaged. [Lord *Campbell* C. J. Suppose he had 15*l.* in his pocket, but not 115*l.*] That should, at any rate, be alleged as special damage. An action for breach of contract may be maintained, though the damage be merely nominal: but an action *ex delicto*

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(*a*) Before Lord *Campbell* C. J., *Erle* and *Crompton* Js.

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cannot, without actual damage. In *Tancred v. Leyland* (a) it was held that an action in tort could not be maintained by tenant against landlord for distress for more than was due, without an allegation that the amount taken or sold was unreasonable in respect of what was really due. In *Galwey v. Marshall* (b) it was held that no action lay for words imputing incontinency to a clergyman, unless he held a benefice or some office of temporal profit; there being no actual damage.

Pearson, contra. It is now no objection to a declaration that it discloses more than one cause of action without shewing which is relied on. As to stat. 7 & 8 Vict. c. 96. s. 57., there seems ground for contending that the word "recovered" applies more properly to what the plaintiff actually and properly gets than to the nominal amount of the verdict. But, at any rate, actual damage is here shewn. The difficulty of the judgment debtor obtaining the sum indorsed on the writ is greater, the larger the sum indorsed. [*Erle J.* In *Tancred v. Leyland* (b) the Exchequer Chamber seems to think that, as there might have been a distress, whatever the amount due, no harm was done by naming too large a sum in arrears.] In that case there was no allegation of malice [*Crompton J.* How do you say that the difficulty of raising the sum indorsed affects the present plaintiff? The sheriff has no authority to receive the sum from him, but must bring the body into Court.] The declaration avers that by means of the premises the

(a) 16 Q. B. 669., in Exch. Ch.; reversing the judgment of Q. B. in *Leyland v. Tancred*, 16 Q. B. 664.

(b) 9 Exch. 294.

plaintiff was prevented from attending to his affairs, and was injured in his credit and put to expence. An action lies for such damage resulting from a proceeding taken maliciously and without probable cause. In *Wentworth v. Bullen* (a) this Court clearly considered that to indorse a ca. sa. with a sum above the amount due, and execute it by caption, was a wrong for which an action would lie. The same principle was admitted by this Court in *Saxon v. Castle* (b), with the qualification, that it is necessary to allege malice: and that is done here. It was also assumed in *Gough v. Cribb* (c); only there the proof failed. [Lord Campbell C. J. There the grievance was that too many goods were actually taken: do you shew here that the plaintiff has suffered an hour's inconvenience?] The allegation of special damage meets that question. In *De Medina v. Grove* (d) the complaint was much the same as here, except that there was not, as here, any allegation of malice and want of probable cause; and in the absence of such allegation, it was held that the action did not lie: it should be noticed that there, in the judgment of this Court, *Page v. Wiple* (e) was inaccurately cited, as pointed out in a note (g). A malicious arrest for too much on mesne process is clearly actionable, as appears from *Austin v. Debnam* (h) and *Ross v. Norman* (i); and the malice may be shewn by the amount of debt as reduced by

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(a) 9 B. & C. 840.

(b) 6 A. & E. 652.

(c) 11 M. & W. 497.

(d) 10 Q. B. 172., in Exch. Ch.; affirming the judgment of Q. B. in *De Medina v. Grove*, 10 Q. B. 152.

(e) 3 East, 314.

(g) 10 Q. B. 169. note (c).

(h) 3 B. & C. 139.

(i) 5 Exch. 359.

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payments or counter claims; *Sims v. Jaquest* (a) *field v. Archer* (b). That rests upon the ground of extortion; a ground equally applicable to arrest process. [Lord Campbell C. J. The analogy is close if you could shew that an arrest, on final process for the larger sum differs from an arrest for the smaller sum.] The allegation of special damage connotes injury to the plaintiff with the arrest for too large a sum. [Lord Campbell C. J. But can they be so connected? *Crompton J.* In the case of a *fi. fa.* the sheriff is to take goods to the amount named; but he is not to take the body more for much than for little. In this case the plaintiff is affected by the direction to the sheriff to take the body. The party arrested may pay into Court, or into the plaintiff's attorney: but the attorney is not bound to receive less than the sum indorsed.

Ogle, in reply. The indorsement on the first warrant was correct; and the practice is for a surrendering debtor to indorse on a second warrant the sum indorsed on the first. It is not the act of the judgment creditor. In *Wentworth v. Bullen* (c) there was a very special allegation of damage, the bankruptcy of the plaintiff by imprisonment. [*Willes*, *amicus Curie*, mentioned the Statute, 6 Ann. c. 7., which, by sect. 1, requires the sheriff at whose suit execution issues to certify under his hand what sum he "demands and insists on to be paid to the plaintiff by conscience due to him, after all equitable deductions that ought to be made out of the sum, for which the judgment is given;" and, by sect. 2, enacts that,

(a) 10 Bing. 510.

(b) 5 B. & Ald. 511.

(c) 9 B. & C. 840.

party "shall appear wilfully, fraudulently, and maliciously to have overcharged the party, against whom such execution issues, in such certificate," he shall answer to the party grieved his treble damages: the execution to be marked, by the proper officer, with the sum contained in the certificate.]

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Cur. adv. vult.

Lord CAMPBELL C. J., on a later day in this Term (15th *June*), delivered the judgment of the Court.

We are of opinion that on this demurrer the plaintiff is entitled to judgment.

To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is *prima facie* lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment debtor is to apply to the Court or a Judge that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause:

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i. e. the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor. The Court or Judge to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment and have been utterly ruined in the circumstances.

It has been argued that, where the process of execution is a writ of *capias ad satisfaciendum*, the action will not lie, because the sheriff is merely commanded to take the body of the debtor to satisfy the sum recovered by the judgment; that, where the debtor's body may be lawfully taken, the sum indorsed upon the warrant is immaterial; and that, as the sheriff has no authority by the writ to liberate the debtor on receiving from him the whole sum recovered or any part of it, in point of law no damage can be considered as having accrued to the debtor. But it is obvious to common sense that the debtor may be grievously damaged by reason of the execution under a *ca. sa.* being for the full amount of the sum recovered by the judgment when only a very small sum is due. His imprisonment is thereby likely to be greatly prolonged; and, though by the mere force of the writ the sheriff is not authorized to receive the money to levy which is the real object of the execution, it is well known, and may be capable of proof, that, in practice, the attorney for the judgment creditor may name a special bailiff to whom the warrant is to be directed, and that he is authorized to discharge the debtor on payment of the sum indorsed on the warrant to be levied, with poundage and other expences.

any rate it is quite clear that, by a declaration on the warrant that the whole sum recovered is to be levied, although the greatest part of it has been paid, the debtor must be greatly embarrassed and delayed in raising the small balance remaining due, and in applying for his discharge. There appears to be no authority amounting to an express decision that such an action is maintainable: but we think there is a strong indication by the majority of the Judges who took part in the decision of *Wentworth v. Bullen* (a), *Saxon v. Castle* (b), *De Medina v. Grove* (c), that, with an allegation of malice and want of reasonable or probable cause, such an action is maintainable, although not without that allegation. In the last case *Wilde* C. J. does say (d): "The plaintiff here might have applied, if the state of facts justified the application, either, before the arrest, to have satisfaction entered up, or, after the arrest, to be discharged. *It might therefore be a question whether, even with all proper averments on the record, the proper remedy would be by action.* For it might be contended that what is complained of by the plaintiff was *mere irregularity.*" With great respect, we do not think that there is any irregularity in such a proceeding, the ca. sa. and warrant following the judgment. But, if there be malice and want of reasonable or probable cause, we do not for this purpose see the difference between an arrest for an excessive sum on mesne process and such an arrest in execution. The increased difficulty in obtaining a discharge may be as great a prejudice in the one case as finding bail for a larger sum in the other.

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(a) 9 B. & C. 840.

(b) 6 A. & E. 652.

(c) 10 Q. B. 172.

(d) 10 Q. B. 177.

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If the action will lie, we are now to see whether the present declaration the wrong and the damage sufficiently alleged. The plaintiff, after clearly stating that 100*l.* of the 115*l.* 2*s.* for which the judgment recovered had been satisfied, goes on to allege "the defendant, falsely, maliciously, and without reasonable or probable cause whatever, caused procured" the sheriff to make and grant their warrant upon the said writ to bailiffs, commanding them take the now plaintiff and him safely keep," &c., satisfy the now defendant the said sum of 115*l.* 2*s.*, "*which said warrant was then indorsed with a direction the said bailiffs to levy such sum of 115*l.* 2*s.*: and then upon the now defendant, falsely and maliciously, without any reasonable or probable cause for so do caused and procured the said last mentioned warrant be delivered to such bailiffs, and, falsely and maliciously and without any reasonable or probable cause, caused and procured the said bailiffs to arrest and take plaintiff by his body upon the said warrant to satisfy the defendant the said sum of 115*l.* 2*s.*, so pretend to be then due to him as aforesaid."*

It is said that there is no allegation that the defendant indorsed the warrant to levy the full sum of 115*l.* 2*s.*, or gave any special directions to the sheriff. But the indorsement is a plain assertion that the whole sum remained due, that the object of the execution was to compel payment of the whole of that sum; and the making of the warrant, the indorsement, and the arrest, are all alleged to have been caused by the defendant maliciously without reasonable or probable cause.

Objection is next taken that there is no sufficient allegation of damage. But the plaintiff goes on

allege that he was accordingly taken and imprisoned on such warrant, and lodged in gaol, "and there kept and detained" for four weeks, until he "could procure his discharge from such custody, by applying to" one of the Judges of this Court, who made an order that he should be discharged out of custody: and that, "by means of the premises, he not only was prevented from attending to his affairs and business, and was injured in his credit and character, but also, by means of the premises, he was put to and incurred great costs and expences" "in and about procuring his liberation and release from the said imprisonment." It is said that it might have been all the same if he had been arrested, as he lawfully might have been, merely to satisfy the balance of 15*l.* 2*s.* But he alleges, and undertakes to prove, that the long imprisonment was caused by the excessive sum being marked on the warrant to be levied; and that what he suffered, and the expence he incurred, arose "by means of the premises," viz. the defendant having so maliciously and without reasonable or probable cause caused the warrant to be delivered to the bailiffs indorsed with the direction to the bailiffs to levy the full sum of 115*l.* 2*s.*, and having caused him to be arrested to satisfy that sum. Therefore it seems to us that he sufficiently connects what he says he has suffered with the wrongful acts of the defendant; and that there ought to be judgment for the plaintiff.

Judgment for plaintiff.

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The QUEEN against RUSSELL.

Where a prosecution, though criminal in form, is in substance merely a proceeding for trying a civil right, the Court, after an acquittal, will grant a new trial for misdirection or a verdict contrary to the evidence, and will not restrain itself to correcting the miscarriage by merely suspending the judgment.

Where, whether an indictment for obstructing a navigation by erecting a wall be within this rule.

Per Lord Campbell C. J., and *semble* per Crompton J., it is not.

Per Coleridge J., *semble* that it is; but that in cases within the rule the misdirection against evidence must, to justify granting a new trial, be more palpable than requisite in proceedings which are civil in form.

The Judge, on the trial of such an indictment, asked the jury whether they thought the erection would prove "a material nuisance," in which case they were to find the defendant guilty; but told them that, if they thought the "nuisance" was so slight, rare and that the defendant ought not to be made criminally liable for it, they should acquit, and, the jury saying that they considered the erection, "although a nuisance, sufficiently so to render the defendant criminally liable," he directed an acquittal and motion for a new trial for misdirection:

Held, by Coleridge and Crompton Js., and *semble* per Lord Campbell C. J., that this was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; the jury must be understood as finding that the obstruction in question was so insignificant. And that therefore there was not a misdirection warranting a new trial.

THE indictment charged that, from time where there was and is a parcel of land covered with situate &c., used by all the liege subjects &c., with ships and other sailing vessels, steam vessels and to go, return, pass, repass, labour, stay and anchor their free will and pleasure, without any obstruction or impediment: and that there is, upon said land, a large bank of sand and earth, situated which at times is covered with water, and over the said liege subjects are then accustomed, with ships, vessels and boats aforesaid, to go, pass and as aforesaid: and, from time whereof &c., the said subjects have been used and accustomed, and so to anchor their said ships, vessels and boats to and the said bank, without any let, hindrance or obstruction whatsoever. That defendant, well knowing the pro-

but intending and contriving to impede and hinder the said liege subjects from going, returning, passing and repassing, staying and anchoring, in, over and upon the said land so covered with water as aforesaid, and in over and upon the said bank when covered with water as aforesaid, did, on &c., at &c., unlawfully and injuriously erect, put and place on and across the said bank, and over and across the said land so covered with water as aforesaid, a certain stone wall of great length and height, to wit of the length of two hundred yards and of the height of three feet, and did there and then, unlawfully and injuriously, put and place divers, to wit twenty, heaps of large stones in and upon the said bank and the said land so covered with water; and the said stone wall so erected, put and placed, and the said heaps of stone so put and placed, from the said &c. until the day of the taking of this inquisition, did there unlawfully and injuriously continue, and still doth continue; so that the liege subjects &c., during the time aforesaid, could not, and still cannot, go, &c. with their ships, &c. in and over the said land so covered with water, and in and over the said bank when covered with water as aforesaid, as they ought and were wont and accustomed to do. To the great damage and common nuisance of Her Majesty's liege subjects going, returning &c. in, over and along the said land so covered with water, and the bank aforesaid; to the evil example &c., and against the peace &c.

Plea: Not guilty. Issue thereon.

On the trial, before *Williams J.*, at the last Assizes for *Carnarvonshire*, it appeared that the defendant had in fact erected a wall or embankment on the place described; but a question arose, whether, upon the

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Regina v. Leigh (a) a new trial was granted after a verdict for the defendants: but the question was scarcely discussed. [Lord Campbell C. J. The direct mode at least appears to be the best when the question is substantially as to a civil right.] At any rate, the new trial will not be granted on the question of the weight of evidence: that distinction has been pointed out in the case of penal actions by Lord Kenyon; *Wilson v. Rastall* (b), *Calcraft v. Gibbs* (c). [Joseph Brown, amicus Curiae, mentioned *Hall v. Green* (d). Coleridge J. A penal action may have been thought odious.] In *Rex v. Sutton* (e) the Court acted on the precedent of *Rex v. Wandswoorth* (g) by suspending the judgment, and refused to make a precedent for granting a new trial after an acquittal. *Rex v. Russell* (h) was there cited: but in that case the objection that a new trial could not be granted for misdirection was not taken. *Regina v. Chorley* (i) was a case of improper reception of evidence and misdirection. [Lord Campbell C. J. You may perhaps be justified in contending that this indictment may really charge an offence, and that the verdict will not bind any right.]

Secondly, there was no misdirection. The learned Judge, in effect and almost in words, left the case to the jury in conformity with the language of the judgment in *Rex v. Tindall* (k), where, upon a special verdict finding that, "by the defendant's works, the harbour is in some extreme cases rendered less secure," this Court held "that no person can be made criminally responsible for

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(a) 10 A. & E. 398. See p. 406.

(b) 4 T. R. 753. 758.

(c) 5 T. R. 19. 20.

(d) 9 Exch. 247.

(e) 5 B. & Ad. 52.

(g) 1 B. & Ald. 63.

(h) 6 B. & C. 566.

(i) 12 Q. B. 515.

(k) 6 A. & E. 143. 152.

[illegible]

1. n. 4. B. 11th See Rogers & Charbonneau, n. 4. B.

have understood the words of the learned Judge when he spoke of a "nuisance." They cannot have supposed that, if the facts shewed what amounted really to a nuisance, *commune nocumentum*, the defendant was to be acquitted. "It would," to use the words of Lord *Tenterden* in *Rex v. Russell* (a), "be a very ill compliment to juries to suppose that they are likely to be misled by such accidental expressions." And the jury, when they found that the embankment was a "nuisance" but not so sufficiently to render the defendant criminally liable, must have meant what, in more strict language, would be expressed by saying that there was an obstruction, but not one sufficient to amount to a nuisance.

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Thirdly, the verdict was justified by the evidence. (The argument as to this is omitted.)

G. O. Morgan, contra. This prosecution is in the nature of a proceeding for enforcing a civil right. [Lord *Campbell* C. J. Do you say that, if a man were indicted for keeping up an offensive manufactory, we could set aside a verdict of Not guilty on the ground of its being contrary to the evidence?] The nearest analogy appears to be that of an indictment for non-repair of a high road. [Lord *Campbell* C. J. That is very much in the nature of a question as to a civil right: the fine imposed is usually nominal: but can we know that here the conduct of the defendant, if he had been found Guilty, might not have been such as to demand substantial punishment?] The Court, in *Regina v. Cricklade* (b), made

(a) 6 B. & C. 566. 603.

(b) *The Queen v. The Inhabitants of Cricklade, St. Sampson*. January 12, 1849. This was an indictment of the inhabitants of a parish for non-repair of a highway, charged as a public carriage way and as a horse and pack

as that the party committing it is not to be held criminally liable, though there may be an obstruction so slight as not to create a nuisance. It was once thought that, when there was a public nuisance, though producing a private injury, no action lay; *Hubert v. Groves* (a). The law, however, is now held to be otherwise (b). There actual damage to the individual must be shewn (c); but, in the case of a public indictment, a nuisance may be proved to exist without proof that any one has actually been annoyed. *Rex v. Russell* (d), which has been referred to, was overruled in *Rex v. Ward* (e); and in *Regina v. Randall* (g) *Wightman J.* ruled accordingly. [Lord Campbell C. J. Yes, as to the doctrine of disproving a nuisance by mere proof that, though public injury is produced, greater public benefit is produced.] *Regina v. Betts* (h) is rather an authority against the defendant: the jury there found that there was no obstruction: had they found any obstruction, the verdict, as appears from the language of the Judges, would have been entered for the Crown.

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Lastly, the verdict was against the weight of evidence. (The argument as to this is omitted.)

Lord CAMPBELL C. J. I am of opinion that this rule should be discharged. I am not called on to give any positive opinion as to the direction: probably it could not be said to be a misdirection, though I think the expression is not felicitous. Nor need I decide whether the verdict be contrary or according to the evidence.

(a) 1 *Esp. N. P. C.* 148.

(b) See *Chichester v. Lethbridge, Willes*, 71.

(c) *Dobson v. Blackmore*, 9 *Q. B.* 991 (see errata to that volume).

(d) 6 *B. & C.* 566.

(e) 4 *A. & E.* 384.

(g) *Car. & M.* 496.

(h) 16 *Q. B.* 1022.

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The ground of my decision is, that this is a proceeding, and that the defendant ought not to be twice put in peril for the same cause. That is a maxim of *English* law which will, I hope, always be held sacred. I, for my own part, reprobate the speculations as to the propriety of granting a new trial after acquittals for felony and murder. If the conviction is improper, it should be set aside; but the same practice will never prevail in the case of an acquittal. When an indictment is instituted and it raises a question of civil right, I agree with the law which I find established. When there is no charge of an offence, it has been customary to acquit by suspending the judgment of acquittal; and with Lord *Denman* and his colleagues (a) in that what it has been the practice to do indirectly when done, be done directly. But, where a real offence is charged, it would be creating a dangerous precedent to grant a new trial after an acquittal. I do not know where we should stop. A nuisance may be created by exercising an unwholesome trade, by offensive noise, by numerous other means; and one can conceive that so far as to produce manslaughter or even murder, if a grave offence is charged: the defendant is acquitted having obstructed the navigation: navigation is perilled by both ships of war and merchantmen. The case may be most serious. Then, does the verdict decide a civil right? No; for, after a verdict of Not guilty, may be tomorrow another indictment preferred against the same party, to which the present acquittal will be no bar. I think, therefore, that this is not within the class of cases in which a new trial ought to be granted after a

(a) See ante, p. 947, note (b).

COLERIDGE J. I am also of opinion that the rule should be discharged, though I do not entirely concur in the reasoning of my Lord: and yet, as he words his opinion, I do not know that I am prepared to differ from it. I rather fear the consequences. From mere necessity, and from the requisitions of justice, the Courts have gradually altered the practice on this point. When a proceeding, though criminal in form, was in substance merely civil, they began with suspending the judgment: and then, I think very rightly (I may say so, though I was myself a party to the decision (a)), the Court said that they would do directly what had been done indirectly. That, I apprehend, was not decided on the ground of any distinction between misdirection and a verdict contrary to evidence; for the Court, according to its former practice, would, I conceive, have suspended the judgment equally in the two cases, and therefore ought equally to grant a new trial in each. And I am not quite sure that the present is not rather a civil than a criminal case; and, if our judgment were to turn exclusively upon that point, I might reluctantly feel myself obliged to differ from my Lord. But it is quite consistent with holding this proceeding to be criminal only in form, to hold also that in such a case we ought to be more careful how we set aside a verdict than in the case of a proceeding civil in form as well as substance. The Court ought to keep in view the considerations which my Lord has pointed out, and to act with more strictness. We therefore ought not, in such a case, to grant a new trial for misdirection, unless we are sure that the direction was not only inaccurate but

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(a) See ante, p. 947, note (b).

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was also so understood by the jury as to lead to apply a wrong test. And so as to the evidence shall grant the new trial if the verdict is perverse not if the evidence is merely conflicting. Here we were tied to the actual words, I should find it difficult to sustain the direction: and I should be sorry that it thought that a man may legally commit a offence. But, if we find that the word "nuisance" so used as merely to import an obstruction, great or small, I should not, on account of the inaccuracy of expression, grant a new trial. And I think it must be so understood here. Then, as to the evidence. *Morgan* has pointed out strong grounds for questioning the result: but all was before the jury. In substance the verdict is: We cannot say that something has been done which makes a stoppage in the water; but it is so minute as not to be a practical obstruction which appreciably disturbs the navigation. If you do not understand the charge and the verdict, you must say the Judge's language is incorrect, and the verdict so incorrect that the Judge must have interposed and have told the jury that this was not what he asked. You must say that this was what he meant and they understood.

ERLE J. I have nothing to add beyond saying I am of opinion there is not sufficient ground shown for granting a new trial.

CROMPTON J. I am of the same opinion. In the first place, I am not at all sure that the case is brought within the limits within which the Court grant new trials. The general rule is, that they will not grant a new trial after an acquittal. This rule has been infringed

some few cases of non-feazance and of civil liability ; but we should not be hasty in extending this exception where another indictment may be immediately preferred and no right is bound. No doubt can be entertained of the power of the Court to interfere : and, had there been a verdict here warranting a judgment of prostration, very good ground might be shewn for interfering. But here it is an acquittal. I do not know where we should stop : it is very undesirable to extend the practice. In this particular case, it would be very wrong of us to interfere. No doubt it is desirable that the law should not be understood to be as Mr. *Morgan* understands the Judge to have laid it down : but the absurdity of such a result makes me think that the Judge meant that there must be something more than a mere mathematical nuisance, such as would be produced by a child's building ; something amounting to what my brother *Coleridge* calls a practical obstruction. So understood, the summing up is right ; on the other understanding it was wrong. The only doubt on my mind was, whether the jury might not have misunderstood the Judge. If they used the words in the sense attributed to them by Mr. *Morgan*, he would have been justified in insisting that the finding was for the Crown. But I agree entirely with Lord *Tenterden*'s language in the passage cited from *Rex v. Russell* (a) : it is most dangerous to fish out particular words where the material sense distinctly appears from the whole of what is said.

Rule discharged.

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(a) 6 B. & C. 603.

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Monday,
June 12th.

HUGHES *against* HUMPHREYS.

Stat. 5 & 6
W. 4. c. 63.
s. 6. abolishes
all local or
customary
measures, and
imposes a
penalty on
every person
who shall sell
by any deno-
mination or
measure other
than one of the
imperial mea-
sures, or some
multiple or
aliquot part
thereof.

Held that
this applies
only to sale by
measure of
capacity, and
not to sale by
weight esti-
mated in
pounds. And
that therefore
it does not ex-
tend to sale by
any local term
designating a
given number
of pounds
weight. As
to sale of
wheat by *Welsh*
hobbett, it ap-
pearing by
evidence that
this designated
168 lbs. weight,
and that a sale
by hobbett
entitled the
purchaser to
so many pounds
of wheat.

DECLARATION for money payable by de-
fendant to plaintiff for goods sold and delivered by
defendant to plaintiff, and on accounts stated between them.
Pleas. 1. Never indebted. 2. That, before
defendant satisfied and discharged plaintiff's claim for
payment. 3. That the said accounts stated were
correct and concerning the moneys claimed to be payable
for the said goods sold and delivered as in the declaration
mentioned, and not otherwise: that the said goods
sold and delivered were corn, to wit wheat, and
delivered within *Great Britain*; and that the said
goods were bought and bargained for the sale, and the sale, of the said
goods were made by a measure and weight other than
either of them, authorized by an Act passed in the
(5 & 6 W. 4. c. 63., "To repeal an Act of the 5th
year of His present Majesty relating to weights
and measures, and to make other provisions instead
thereof, or by any multiple or aliquot part thereof, as
made, to wit by the hobbett, contrary to the said
statute.

The plaintiff joined issue on these pleas.

On the trial, before *Williams J.*, at the last *Assizes*, it appeared (a) that the hobbett is a

(a) A case of *Lloyd v. Humphreys*, an action brought in the *King's Bench* was tried at the same *Assizes* before *Williams J.* The circumstance that the two cases being identical, it was agreed by counsel that the facts in *Lloyd v. Humphreys* should be considered as having taken place also in *Hughes v. Humphreys*. The same assumption was, there-
fore, made in the present argument.

measure; that the hobbett of wheat contains four *Welsh* pecks; that each *Welsh* peck contains 42 lbs. weight, and therefore the hobbett contains 168 lbs. weight; that an ordinary sack should contain six *Welsh* pecks, that is 252 lbs. weight, or a hobbett and a half. That, if upon weighing the sack it is found to contain less than the 252 lbs. weight, wheat is added, to make up that weight; and, if the sack contains more than the 252 lbs. weight, wheat to the amount of the excess in weight is taken out. In the present case, the sale was made, by sample, at *Rhyl* in *Flintshire*, at so much per hobbett; and the wheat was delivered in sacks of the ordinary kind. Upon this evidence, the learned Judge directed a verdict for the defendant on the third issue: and a verdict was found for the plaintiff on the other issues; leave being reserved to move to enter a verdict for the plaintiff on the third issue.

In last *Easter Term*, *E. Beavan* obtained a rule *Nisi* for entering a verdict for the plaintiff on the third issue, or for a new trial.

Welsby and *C. Milward* now shewed cause. The sale was a violation of stat. 5 & 6 *W.* 4. c. 63. Sect. 6, after abolishing "the measure called the *Winchester* bushel," "and all local or customary measures," enacts that "every person who shall sell, by any denomination of measure other than one of the imperial measures, or some multiple or some aliquot part, such as half, the quarter, the eighth, the sixteenth, or the thirty second parts thereof, shall, on conviction, be liable to a penalty not exceeding the sum of forty shillings for every such sale: provided always, that nothing herein contained shall prevent the sale of any articles in any vessel, where

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such vessel is not represented as containing any of imperial measure, or of any fixed, local, or custom measure heretofore in use." It will be contended in support of the rule, that a hobbett appears, upon evidence, to be a measure of weight and not of capacity. It is important, however, to trace the history of the Stat. 22 C. 2. c. 8. s. 2. imposes a penalty for any sort of corn usually sold by the bushel by any other bushel or measure than the *Winchester* measure, containing eight gallons to the bushel. In *Rex v. Mordaunt* and *Rex v. Arnold* (b) it was held that this law and a subsequent statute, 22 & 23 C. 2. c. 12. s. 2., imposing the pecuniary penalty enforced by the former law, for forfeiture of the corn sold, were still in force, and that a conviction for the penalty and forfeiture good, though suggested in the former case that later statutes had essentially sanctioned the use of other measures. In *v. Thomas* (c) it was held that an action could be maintained upon a contract to sell by the hobbett [Lord Campbell C. J. It there appeared, on the evidence, that a hobbett consisted of four pecks of corn, one quart each : here the evidence is that the weight signifies a certain weight estimated in pounds.] when the contract is completed in the market : the evidence certainly went so far as to shew that it was usually understood that the measure would answer to a certain capacity [Lord Campbell C. J. It might perhaps be a measure of capacity, if the evidence shewed no more than a verbal warranty that it should weigh so much.] but the evidence fell short even of that. In *Owens v. Denby* also a sale by hobbett was held to be illegal. [Lord

(a) 4 T. R. 750.

(b) 5 T. R. 353.

(c) *M'Clintock & Y.* 119.

(d) 1 C. M. & R. 71

bell C. J. It was there assumed that the hobbett was a measure of capacity.] The policy of the Legislature has been to discourage the use of local measures. Soon after the decision of *Tyson v. Thomas* (a) stat. 5 G. 4. c. 74. came in force (b). That statute, by sect. 23, repealed (among many others) the two Acts of C. 2. already mentioned, so far as related to establishing standard weights and measures; and enacted, by sect. 15, that "all contracts, bargains, sales and dealings" for any work, &c., or "for any goods, wares, merchandize or other thing to be sold, delivered, done or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken and construed to be made and had according to the standard weights and measures ascertained by this Act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void." Under that Act Lord *Tenterden* thought that a sale even by the *Winchester* bushel, not specifying its proportion to the standard weights, was bad; *Watts v. Friend* (c). [Lord *Campbell* C. J. But the sale here, however worded, was at so much per pound avoirdupois.] The same argument might be applied to sales by the *Winchester* bushel, which was always understood to contain 70 lbs.

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(a) *M^c Clel. & F.* 119.

(b) Sects. 15 and 23 were, by stat. 5 G. 4. c. 74., to come in force on 1st *May* 1825; but the time was postponed to 1st *January* 1826, by stat. 6 G. 4. c. 12. s. 1.

(c) 10 *B. & C.* 446.

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[*Crompton J.* You could not have insisted on weight of corn. Lord *Campbell C. J.* Where the bargain was for so many times 168 lbs., which insisted upon. Does stat. 5 & 6 *W. 4. c. 64.* more than prescribe that, where you do sell by measure it must be by the imperial measure?] In *Rex v. Arnold* (a) the conviction, which was sustained, stated the party "did unlawfully buy of and from" a certain quantity of wheat containing divers, fifteen bushels, in a different manner than 1 bushel or measure agreeable to the standard" commonly called the *Winchester* measure." It was alleged that the sale was by capacity: the contrary would have been proved by a sale by weight (b). 21 of stat. 5 & 6 *W. 4. c. 63.* avoids all contracts by "any weight or measure other than those authorized by this Act, or some aliquot part thereof," and imposes a penalty for the use of such weight or measure.

Joseph Brown and Coxon, contra, were not upon.

Lord CAMPBELL C. J. I am clearly of opinion that this objection cannot be supported. It is no ground for the objection that a particular measure is named; the statutes referred to, on which the decisions have taken place, were to the effect only that when the sale was by measure this should be by measure of a particular

(a) 5 *T. R.* 353.

(b) *C. Milward* also mentioned that the conviction in *Rex v. Arnold* (4 *T. R.* 750) is to be found in 6 *Wentw. Pl.* 23. It states that the party bought "forty bushels of wheat unground by another and different measure than" the *Winchester* measure.

sort. There is nothing to indicate that, when the sale was by weight, the designation of a given weight by a local measure was illegal. If, however, this was really a sale by measure of capacity it would be contrary to the Act. And the question therefore comes to be, Was it a sale by measure or a sale by weight in pounds? Now, according to the evidence, when you buy by hobbett you buy, not dimensions, but avoirdupois pounds; and the contract is not fulfilled unless that weight is made up: it is therefore a sale of so many times 168 lbs., which is a sale by weight, and no infringement of stat. 5 & 6 *W.* 4. c. 63., or of any other Act.

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COLERIDGE J. concurred.

ERLE J. It is clearly a sale by the pound, the hobbett being a given multiple of a pound.

CROMPTON J. concurred.

Rule absolute (*a*).

(*a*) See *Jones v. Giles*, 10 *Exch.* 119.

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Wednesday,
June 11th.

The QUEEN against The Inhabitants
EARDISLAND.

Justices having, under stat. 5 & 6 W. 4. c. 50. s. 95., ordered a bill to be preferred at the assizes against the inhabitants of a parish, for non-repair of a highway, the prosecutor removed the case by certiorari into this Court; and it was tried on the Nisi prius side at the assizes; and a verdict was given for the Crown.

Held that the prosecutor was entitled to costs, though the proviso in the section speaks only of removal by a defendant.

And that a Judge's order, directing the costs to be paid out of "the rate made

and levied" in the parish according to the statute, was not for that reason bad.

The order did not name the amount of costs. Held, on motion to set the order aside, that it was nevertheless good.

A side bar rule was obtained for the coroner and attorney of this Court to tax the costs. Held proper, by Lord Campbell C. J. and Erle J., dissentiente Crompton J.

THIS was an indictment preferred against the inhabitants of the parish of *Eardisland* in *Herefordshire*, under stat. 5 & 6 W. 4. c. 50. s. 95. The indictment was found at the *Herefordshire* assizes: and the prosecutor removed the indictment into this Court by certiorari, and the case was tried on the Nisi prius side, at the *Herefordshire* assizes, before *Wightman* J.; and a verdict was found for the Crown. The learned Judge indorsed upon the Nisi prius record an order: "that the costs of this prosecution be paid out of the rate made and levied in the parish of *Eardisland* in pursuance of the statute 5th and 6th *William* 4th, chapter 50. At the last Term a side bar rule was made, that it should be referred to the coroner and attorney of this Court to tax the said costs. In this Term (a),

Whateley moved for a rule to shew cause why the order of the Judge and the side bar rule should not be set aside.

First, the Judge had no power to make this order, Sect. 95, under which it is supposed to be made.

(a) May 27th.

rizes defendants only to remove by certiorari: here the removal was by the prosecutor. [Coleridge J. The clause authorizing a defendant to remove may have been considered necessary in consequence of the certiorari having been taken away (a): but the Crown would not be within the prohibition.] The prosecutor therefore removes at common law, and cannot have the statutable costs. [Coleridge J. referred to *Regina v. Pembridge* (b).] That was a case where the Judge certified that the defence was frivolous, under sect. 98.

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Secondly, the order of the Judge is bad, for not naming the amount of the costs; *Regina v. Clark* (c), *Regina v. Watford* (d).

Thirdly, the order directs the costs to be paid out of "the rate made and levied in the parish:" there may have been no such rate: the order should be for payment out of a rate to be made; that must have been the meaning of this section.

COLERIDGE J. That fault, if it be one, will do you no harm. There is nothing in your first and third points: on the second you may take a rule Nisi.

ERLE and CROMPTON Js. concurred.

(No fourth Judge was present.)

Rule Nisi accordingly.

Keating and *J. Gray* now shewed cause. *Regina v. Clark* (c) is inapplicable. There the indictment was

(a) Sect. 107. See *Regina v. Sandon*, ante, p. 547.

(b) 3 Q. B. 901.

(c) 5 Q. B. 887.

(d) 4 D. & L. 593.

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preferred at the Assizes in the first instance, and by the Judge sitting on the criminal side. The Judge there sits in banc; and what he, when acting as oyer and terminer, does not do cannot be done. In that case, too, the commission of the Judge expired, and the Court had ceased to exist for two years before the application. The order of the Judge here is no more uncertain than an award directing the costs to be paid by one of the parties; it leaves it to the officer of the Court to tax the amount. [Lord Campbell C. J. The officer of the Court at Quarter Sessions taxes, where they order costs. (1854) 12 *Nol. P. L.* 574 (4th ed.) it is said: "where the court of quarter sessions gives costs to the party suing against a rate, it should ascertain the precise amount for if their order directs, that 'the costs of the proceedings shall be taxed by the clerk of the peace,' it is bound to do so at that particular."] That Court is in the same position as the Judge of oyer and terminer. But when the case is tried at *Nisi prius*, having been removed into this Court, the ordinary rules of *Nisi prius* cases are applied. The Judge at *Nisi prius* has no taxing office. In *Regina v. Watford (a)* the order was held bad for not specifying the fund from which the payment was to be made. The function of the Judge who tries the case is, to see that the case falls within sect. 95, whether the road is really a highway, whether the prosecution has been ordered by justices, and the like. He is to order that costs be paid by the defendant. [Lord Campbell C. J. That may perhaps be all that the words of the section require: but the authorities

(a) 4 *D. & L.* 593.

that, in at least some cases, the Judge has to do more.]
 Not where the trial is at *Nisi prius*. [Lord Campbell
 C. J. *Regina v. Clark (a)* was certainly not a case at
Nisi prius; but *Regina v. Watford (b)* was. But the
 Master of the Crown office, Mr. Robinson, informs us
 that the practice has been in conformity with what has
 been done here.]

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Whateley and *Skinner*, contra. Sect. 95 confers a
 very special power on the Judge. It is admitted, on the
 other side, that the amount must be ascertained both by
 the Court of Quarter Sessions and by the Judge of oyer
 and terminer. [*Erle J.* The 95th section contemplates
 three tribunals: first, the Judge of oyer and terminer
 (improperly called Judge of Assize); secondly, the
 Quarter Sessions; thirdly, by the proviso, this Court,
 upon a removal from Quarter Sessions by the defendants.
Crompton J. The effect of the proviso rather seems to
 me to be to put the Judge at *Nisi prius*, in this respect,
 on a footing with the Judge of oyer and terminer: I do
 not think it has any thing to do with this Court, so far
 as the costs are concerned.] Each of the three tribunals
 has the same means of taxing the amount. It is said
 that the Judge has no taxing officer: why should he not
 employ the clerk of assize to tax? *Regina v. Clark (a)*
 is in point. [Lord Campbell C. J. That case shews only
 that a mandamus would not issue to command the pay-
 ment of a sum not ascertained.] *Patteson J.* there says :
 "when the legislature says that the Judge shall direct
 the costs to be paid, the meaning must be that he should
 ascertain the amount, either by himself, or his officer,

(a) 5 Q. B. 887.

(b) 4 D. & L. 593.

1854. or some one whose advice he may take." *R*
 The QUEEN *Watford* (a) is also an authority in favour of t
 V. though not a very strong one; for the objection
 Inhabitants of there most weighed with the Judge was not th
 EARDISLAND. insisted upon. The order for costs, when made
 order of the Judge, not of this Court. The que
 whether the order, as it stands, is good or bad: a
 bad for its generality, and cannot be aided by a
 this Court in banc.

Lord CAMPBELL C. J. I am of opinion th
 rule should be discharged. It seeks to disturb
 tice which, as our officer certifies to us, is the
 practice, and which is certainly a most convenie
 It is clear that justice may be done in this way
 than in the way suggested by the party impugn
 Still we must alter the practice, if we are bound
 so by the words of the statute. But I think
 not so bound. The order of the Judge follow
 statute ipsissimis verbis, and is unimpeachable, w
 what has been done by the side bar rule be ri
 wrong. But I think that the side bar rule is rig
 that the costs ought to be taxed by the offic
 should include the costs which have been incurre
 sequently to the assizes. The record is brought h
 certiorari, and has become a record of the Co
 Queen's Bench. We are to give our judgment up
 and are invested with power to estimate the amc
 costs. My brother *Erle* has shewn that the 95th s
 contemplates three tribunals, the sessions, the C
 oyer and terminer, and the Judge who at Nisi
 tries the cases on the record of this Court. This

(a) 4 D. & L. 593.

third case: and, upon a fair interpretation of the Act, the Judge at Nisi prius is to make an order which is to be carried into effect by our officer ascertaining the amount of costs down to the time at which the last costs are incurred. I cannot find that in so deciding I am acting against the authority of any case. I approve of the decision in *Regina v. Clark (a)*: no mandamus can go commanding the payment of an indefinite sum. *Regina v. Watford (b)* was decided on the ground that the order was bad for not ascertaining the fund from which the payment was to be made; and on that ground alone.

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ERLE J. I also am of opinion that the rule should be discharged. The 95th section in the first place provides two tribunals. One of these is called "the next assizes;" and afterwards the words are "the Judge of assize before whom the said indictment is tried:" but the Judge who tries an indictment sits, not under a commission of assize, but under a commission of oyer and terminer; so the Court of oyer and terminer must be the tribunal meant. The other is the Court of Quarter Sessions. In these two cases, it has been held that the order for payment of costs must specify the amount. This is a third tribunal, contemplated in the proviso at the end of the section; and the Judge has here not specified the amount. So that the question is, whether there be a distinction in this respect between the two tribunals first named and that contemplated under the proviso authorizing a removal to this Court. Now there is good reason why the Commissioner of

(a) 5 Q. B. 887.

(b) 4 D. & L. 593.

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oyer and terminer who tries the case, or the Sessions, should fix the amount. In each of the cases the tribunal which tries has full power to dispose of the case. On judgment being pronounced, the record has finished its office and prosecution is at an end. With reason, therefore, tribunals are entrusted with the duty of ascertaining the amount, and cannot hand this duty over to an officer. It is not supposed that the Judge or Sessions ascertain the amount themselves: they leave it to the act of their officer; but this makes it clear that the adoption should take place before their office is at an end. But is this reasoning applicable to a trial at bar removed by certiorari? Suppose the case were removed by certiorari; there is there no Judge of assize; yet the costs could be given and estimated; for I presume it could be contended that a party, by removing to this Court, loses his right to costs. Now, when a trial is removed by certiorari, our officer is ordered to tax the costs. Then in the course of practice in the case of trials at Nisi prius the Court orders its officer to tax; the practice in respect does not differ, whether the trial be at Nisi prius or at bar. But it is said that the Judge at Nisi prius is in the same position as what is called "the Judge of assize," meaning the Judge of oyer and terminer. I think, is wrong. The Judge at Nisi prius is not the Judge of this Court; and the analogy of a trial at bar applied to a trial at Nisi prius is clear that he cannot ascertain the costs; for the costs must be returned to the Crown office, so that the costs do not fall under the notice of the Judge at Nisi prius. If, in any case, he can ascertain them, I see nothing to shew that he must: and I think ordinary practice may prevail, and that he may

sub silentio the act of the officer. The trial at Nisi prius takes place subject to the contingency of a new trial being ordered by this Court, in which case the order of the Judge would fall to the ground. It seems to me that the prosecutor has here followed the right course.

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CROMPTON J. I agree that there is no reason for setting aside the Judge's order, which may be the foundation for a subsequent order. But I think that, under this proceeding, the prosecutor cannot get his costs, and that some further step is wanted. But, as at present advised, I do not think this the proper mode for obtaining these costs. I think this Court has nothing to do with the matter. Upon the decisions, it seems clear that the Judge who tries is to settle the amount. The effect of the side bar rule is to delegate the authority of this Court to its officer; and, after he has taxed, if the amount is not paid, an attachment may go: so that the Judge who orders the payment really does nothing as to the amount. Now, according to the very words of Mr. Justice *Patteson*, which have been cited, "when the Legislature says that the Judge shall order the costs to be paid, the meaning must be that he shall ascertain the amount either by himself, or his officer, or some one whose advice he may take" (a). But by the proposed proceeding we shall take this away from the Judge. It seems to me that the party who tries is the party ultimately to say what is to be paid. It is admitted that this is so when the trial is at Quarter Sessions or before a Judge of oyer and terminer. Suppose the Judge at Nisi prius is not a member of this Court: if we direct

(a) 5 Q. B. 894.

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our officer to ascertain the amount, we withhold question of amount entirely from the Judge. I contended that the Judge at Nisi prius cannot amount: and suppose he chooses to do so, by assistance, and giving the sanction of his name ascertained amount: can we say that he is? The Judge may not agree to the amount which the officer fixes: but we are taking from him the power of exercising his judgment on the amount, which is clear to me that he ought to have. I think, therefore, that we have nothing to do with the matter, and that the side bar rule is wrong. A difficulty is suggested: costs may be incurred in respect of what takes place at the assizes. I do not see the difficulty: the Judge may not ascertain the amount while he is sitting at Nisi prius but may do so after all the proceedings are brought to an end. It is said that the 95th section contemplates three tribunals. I think that makes no difference. The proviso at the end of the section enables a defendant to remove from the Quarter Sessions: a little ago there was a doubt whether he could remove the Assizes; but the doubt did not prevail (a). I think the effect of the proviso is only to put the Judge at Nisi prius into the position of the Judge of oyer and terminer. To grant this side bar rule is as much to say that this Court could order the payment of the costs. But we cannot say whether the requisites of the statute were complied with, as, for instance, whether the liability was in dispute. It seems to me, therefore, that this course, though a convenient one, is not the proper one. If the question were new, I should be more inclined to put a liberal interpretation on the section.

(a) *Regina v. Sandom*, ante, p. 547.

Lord CAMPBELL C. J. added: I wish to say (not by way of reply to my brother *Crompton*, but by way of explanation) that I think the Judge after granting the order at Nisi prius is functus officio; and I think that he is to grant the order in this form; and then the only mode of carrying it out is by a side bar rule.

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CROMPTON J. The Judge who tried the case will then have no opportunity of dissenting from the taxation of the officer of this Court.

(No fourth Judge was present.)

Rule discharged.

VIDI *against* SMITH and another.

Thursday,
June 15th.

GROVE, in this Term, obtained a rule calling on the defendants in this cause to shew cause why, "within four days after service of the rule absolute to be made herein, they should not deliver to the plaintiff's attorney an account in writing, verified by affidavit, of all the

Pending an action for infringement of a patent for an invention, plaintiff obtained, under The Patent Law Amendment Act, 1852, a rule

Nisi that defendant should render on oath an account of the sale of the articles (alleged to be pirated) sold before the action, and of the profit made therefrom: and keep an account of the articles to be sold and of the profits therefrom: and that plaintiff might inspect the defendant's books. The rule was drawn up on an affidavit that plaintiff had the patent, and that defendant had infringed it, after notice. Cause being shewn,

Held: that no retrospective account of profits made by sales before the action ought to be ordered before final judgment. And that the inspection mentioned in sect. 42 of The Patent Law Amendment Act, 1852, was an inspection of the articles, and not of the books. And so much of the rule was discharged.

But, held that the Court had jurisdiction to order an account to be kept in future, though no injunction was asked for, it appearing that there was a *prima facie* case of infringement: and the Court ordered that the rule should be absolute for such an account, on condition that plaintiff elected not to claim damages at the trial, and undertook, if he failed in the action, to pay defendant the expence of keeping the account so ordered.

The two was known as a working man
 when I received the same patent for
 some of my inventions were granted in 1871. From
 the invention was the first invention. In
 January 1881, he was the inventor of the
 the invention and my invention made in 1881
 in the same machine and in particular in
 which that I was in management of "Pittsburgh"
 and the in 1881 and in the year 1881.

Files never raise. The rule is stated in sec. 21 of The Parent Law Amendment Act of 1874, viz. "The object of this act was to give a Court of common law, in which for the management of a parent is pending, so that that a Court of equity could do as common law action. It was not intended to create equity, but merely to enable the Court to administer the equity already existing. To use the equity cases, care must be taken as to between the two classes of account. The

[illegible]

comprises orders for an account, to be kept in future, by the defendant: such accounts are ordered by the consent of the defendant, and indeed on his application, as a condition for dissolving an interim injunction. The other class of accounts comprises those ordered to be taken before the Master: such accounts are ordered only on the final decree, when the injunction is made perpetual; and the account thus ordered to be taken embraces the account of all by-gone profits. This latter account has, it is believed, in practice never yet been completely taken, inasmuch as the parties always find it impracticable on both sides, and come to a compromise: but, when ordered, it is to be taken before the Master, and is not, like the account asked for in this rule, an account to be rendered by the defendant. That, if sought at all in equity, would be sought by a bill of discovery, not by an order for an account. Then the final account, if worked out, is the account on which the defendant is to be ordered to pay the profits, which he has made by infringing the patent, to the plaintiff, who has established his right to them. It is premature to call upon the defendant to enter into an expensive and troublesome inquiry before it is ascertained that the plaintiff has any right to such profits. And, if it were right to order it, the account should be, not of the profit made by selling the barometers, but of the profit made by infringing the patent right; which is not the same thing. Neither is it right that the plaintiff should at once seek to recover damages for the injury he has sustained, and also seek that the defendant should be declared a trustee for him of the profits made by that infringement. Then, as to the branch of the rule which prays for an interim account. The whole jurisdiction in equity depends on the injunction; and here an

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injunction is not prayed for. [*Erle J.* If it was necessary, the rule might be to order an injunction if the defendant consented to render an account; and that would be perfectly analogous to the practice in equity. In that case the defendant might shew that it was a proper case for an injunction. If there is not an account on the part of the defendant, as a condition for an injunction, neither this Court, nor a Court of Equity, could order an account of what took place after the commencement of the action. [*Crompton J.* An account of the profits accrued after action brought, has been obtained in equity; and, though the jurisdiction given to the Courts of law is to do in the same as was done in equity, the form has been moulded to suit the different machinery of the Courts.] The authorities in equity are all collected in *Hindmarch on Patents*, p. 305 to 343. They shew that the whole right to an account is dependent on having an injunction; or, at least, a substantial one. As to the branch of the rule which requires an inspection of the books, that is a mistake. The inspection mentioned in *The Patent Amendment Act 1852*, is an inspection of the article alleged to be in infringement, a view of machinery, not a discovery of evidence.

Grove, contra. The by-gone account should be ordered, as it will be evidence from which the damages may be estimated. [*Lord Campbell C. J.* It would operate with great injustice if such an account were ordered before the jury: and, if we have power to order it, we should not do so for such a purpose.] Then the account is not available at all for damages. [*Crompton*

equity ever order an account as ancillary to assessing the damages at law? Is it not always as a means of assessing the profits of which the defendant is to be declared a trustee? Lord *Campbell* C. J. I see nothing in the Act to affect the mode of procedure at all where the plaintiff claims damages only; when he waives them and claims profits in equity, the Act applies.]

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Cur. adv. vult.

Lord CAMPBELL C. J. now delivered judgment.

This was a rule which was obtained soon after the commencement of the action, calling on the defendants to shew cause why they should not, within four days after service of the rule absolute to be made hereon, deliver to the plaintiff's attorney an account in writing, verified by affidavit, of all the metallic barometers, called or known as *Bourdon's*, or *Bourdon and Richards's*, Metallic Barometers, sold by the defendants since the 1st day of *October* 1851, and of the profits made therefrom: *and why the defendants should not keep an account of all such barometers sold by them*, and of the profits made therefrom, until such further order as this Court may make in the premises: and why the plaintiff, his attorney and agent, should not be at liberty to inspect the defendants' books, containing any entry relating to any such sale. The rule was drawn up on reading an affidavit swearing that, on 27th *April* 1844, a patent for a new mode of constructing barometers was granted to the inventor, who on 6th *November* 1849 assigned it to the plaintiff: that defendants have sold barometers, identical in principle with those manufactured by plaintiff under the patent: that, although the defendants have been warned against selling such pirated barometers, they sold one

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on the 1st of *May* last at their shop in *London* is believed by the deponent that they have sin many; and that they continue to exhibit one barometers in their shop window. The only in answer merely says that the deponent is i and believes that the question, whether the def barometer is a piracy of plaintiff's, was tried in of law in *Paris*, and decided against the plain that this decision was affirmed on appeal by Court of law in *Paris*.

We think that the greatest part of what is so this rule must be disallowed. Before final judg ought not to grant any retrospective account. account would not aid any account of profits whi then be ordered if the plaintiff obtains a verdi such an account would not be ordered by a C equity before the final decree. We are like opinion that we ought not to make the desire for an inspection of the defendant's books. Th spection" mentioned in the 42d section of stat. 1 *Vict. c. 83.*, we conceive, is an inspection of the ment or machinery manufactured or used by the with a view to evidence of infringement, and d refer to an inspection of books, which is provi by another Act of Parliament. But we think have authority now to order, and that we ought t the account to be kept by the defendants of a barometers as they shall sell upon the principle to be an infringement of the plaintiff's patent, the profits made therefrom, until such further c this Court may make; on condition of the agreeing to waive all claim to recover mor nominal damages at the trial of the action,

condition that, in case the verdict and judgment in the action shall be in favour of the defendants, the plaintiff undertakes to pay to the defendants the expence of keeping such account.

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It has been contended that in the exercise of the equitable jurisdiction now conferred upon us we can only grant an account where there is or has been an injunction. But an injunction does not invariably accompany an account in a Court of equity; and, if it did, in effecting the object in view by ordering an account we cannot be governed by the same rules of procedure which it has been found expedient to adopt in Courts of equity. With regard to an account to be kept during the litigation, we are to see whether there is laid before us reasonable evidence of a valid patent, of this patent having been infringed by the defendant, and of the defendant making profits by the infringement. The affidavit relied on by the plaintiff in this case is not strong: but, being wholly unanswered by the defendants, we think that it is a sufficient foundation for this part of the rule. Such an account is often required by a Court of equity on dissolving an injunction, *ex parte*, against the infraction of a patent, the plaintiff going to law to establish his legal right; and we think that we may properly grant it on such a *prima facie* case as is made out by the plaintiff in this case. But we are of opinion that it should only be granted on condition of the plaintiff waiving his claim to damages: for he ought not to be allowed to seek substantial damages and an account of profits, conjointly. In actions for the infringement of patents, juries have found verdicts for large damages which we have refused to disturb: but we conceive that, if such actions had been brought while

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a bill in equity for an injunction had been
Court of equity would not decree an account
along with a perpetual injunction ; much
entertain a bill praying for an account of
after the verdict. We likewise think it ex
require an undertaking on the part of the
pay the expence of the account, should the
judgment in the action be for the defendants:
without this undertaking, the Court may hav
order this expence to be paid by the plaintiff
the costs of the action.

Rule as

A rule was afterwards drawn up, ordering:
account be kept by the defendants of all such
as they shall sell upon the principle alleged
to be an infringement of the plaintiff's pate
the profits made therefrom, until such furthe
this Court may make ; on condition of th
agreeing to waive all claim to recover n
nominal damages at the trial of the action
condition of, in case the verdict and judgme
action be for the defendants, the plaintiff un
to pay to the defendants the expence of kee
accounts" (a).

(a) See the next case.

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HENRY HOLLAND *against* SAMUEL FOX.Thursday,
June 15th.

SIR *F. Thesiger*, in last *Hilary* Term, *January* 27th, obtained a rule *Nisi* to discharge a rule, absolute in the first instance, obtained by *Webster* in this cause on 17th *January*.

The action was for the infringement of a patent, granted to the plaintiff in *May* 1840, for certain improvements in manufacturing umbrellas. The writ issued on the 8th day of *February* 1853. The cause was tried on 15th *December* 1853; when plaintiff obtained a verdict with 40*s.* damages. *Webster's* rule of 17th *January* was drawn up on reading the affidavit of the plaintiff stating the above dates, and that defendant had, early in 1852, commenced infringements, and had thereby, as plaintiff was informed and believed, made great profits. It ordered that the defendant "do within ten days render to the plaintiff, his attorney or agent, on oath, a full and particular account of all umbrella and parasol frames, made and manufactured by him, his

In an action for the infringement of a patent, plaintiff obtained a verdict for 40*s.* damages.

Afterwards he obtained a rule, absolute in the first instance, ordering defendant to render an account of all the articles which he had before and since the commencement of the action made or sold in breach of plaintiff's patent, and pay to plaintiff the moneys received for such articles. A rule *Nisi* was obtained, on part of the defendant, to discharge this rule. By the

affidavits it appeared that defendant had made profits by the sale of the pirated articles since the commencement of the action; but that he had discontinued the manufacture since the verdict and before the plaintiff's rule was obtained. And it appeared that, shortly after the action commenced, plaintiff's attorney had told the other side that plaintiff would take only nominal damages, and would, if necessary, file a bill in equity to obtain an account of the profits.

Held: that the action was still pending, so as to give this Court jurisdiction under The Patent Law Amendment Act, 1852, sect. 42.

Held also that, there having been a verdict with damages, and there being no continuing piracy such as would give ground for an injunction, no account of the profits before action could be ordered: but, held that the defendant might be considered a trustee for the plaintiff of those profits which he had made, pending the action, after notice that plaintiff would require them; and that an account of those profits might be ordered.

Rule moulded accordingly.

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workmen and agents" (describing the frames), "in of the plaintiff, and for which letters patent were to him dated 7th May 1840, shewing in such the quantity or number so made sold or disposed the defendant, his workmen, agents and others authority or connivance: and that the defendant to the plaintiff, his attorney or agent, all moneys or agreed to be received, and paid by reason manufacture and sale: and that the defendant to the plaintiff on all frames which may remain or unsold at the date hereof such sum or sums or as may be equal to the sums received or agreed received in respect of like frames sold or disposed

Sir F. Thesiger's rule Nisi, to discharge the 17th January, was obtained on affidavits, by defendant and his attorney, the substance of which was that defendant had himself, in 1852, taken out a patent for what he bona fide believed to be a discovery of his own in the manufacture of umbrellas: that he sold the articles: but that, since 17th January 1853 (two days after the verdict), he had discovered the sale: that the manufacture and sale of the articles was, at first, a source of loss to him, and did not become profitable till about three months before the date of the trial; and that during these three months the profit was about fifteen per cent. on the price of umbrellas sold. That, in January 1853, shortly after the action commenced, the plaintiff offered to discontinue proceedings if defendant would take out a licence in the future; which offer was declined; and no account had been given till after the verdict. On affidavits in answer, however, it appeared that plaintiff's attorney had, in July 1853, informed defendant's

that he intended to take nominal damages at the trial, and, if necessary, to file a bill in equity for an account of the profits.

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In last *Easter Term* (*May 10*), Sir *A. J. E. Cockburn*, Attorney General, and *Webster* shewed cause; and Sir *F. Thesiger* and *Hindmarch* appeared in support of the rule of *27th January*; when the Court (*a*) ordered that the case should stand over, in order that inquiry might be made respecting the practice in equity as to granting an account, when applied for after verdict, and without application for an injunction.

In this Term (*May 25*) the rule was argued (*b*).

Webster shewed cause. The practice, in patent causes, always was, as the first step, to file one bill for an injunction, a discovery and an account; so that the question, whether a Court of equity had power to order an account after verdict, never in practice arose. But now, by The Patent Law Amendment Act, 1852 (*15 & 16 Vict. c. 83. s. 42.*), "In any action in any of Her Majesty's Superior Courts of Record at *Westminster* and in *Dublin* for the infringement of letters patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting then for a judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or judge may seem fit." This section would seem to give more extensive powers

(a) Lord Campbell C. J., *Wightman*, *Erle* and *Crompton Js.*

(b) Before Lord Campbell C. J., *Coleridge*, *Erle* and *Crompton Js.*

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than existed in equity: but there are analogies shewing that a Court of equity might have ordered an account after verdict, though, as already said, it is in practice necessary to do so. Thus in *The Countess of Carlisle v. Wilson* (a) a bill prayed for an account of tolls for the last six years, the plaintiffs having established their right by an action in which they recovered damages; and Lord *Erskine* C. overruled a demurrer to the bill. In *Story v. Lord Windsor* (b) it was said that the plaintiff in that case might come into equity, as it was a colliery, "which is a kind of trade, and that an account may be taken of the profits here." The principle is all applicable to the present case, supposing a bill praying for the same relief ordered by the present Court. In *Bacon v. Jones* (c) Lord *Cottenham* C. explained the principle on which equity proceeds, if there has been a laches, to assist the legal remedy when incomplete. In *Crossley v. Beverley* (d) the bill was filed when the patent was about to expire; and an account was ordered of by-gone profits; which was acted on, as appears in *Crosley v. The Derby Gas Light Company* (e). In *Taylor v. Taylor* (g) has been sometimes understood as a decision that there can be no account in equity where there be an injunction granted; but in truth it is only that the plaintiff cannot have an account without proving a title, such as, if necessary, would support an injunction: and *Smith v. The London and South Western Railway Company* (h) is to the same effect.

(a) 13 Ves. 276.

(b) 2 Atk. 630.

(c) 4 Myl. & Cr. 433, 438.

(d) Note to *Sheriff v. Coates*, 1 Russ. & M. 166.

(e) 3 Myl. & Cr. 428.

(g) 1 Russ. & M. 1.

(h) 1 Kay, 468.

present case the damages are not substantial; that would be material in equity; *Sainter v. Ferguson* (a).

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Hindmarch, *contra*. The Patent Law Amendment Act, 1852, has given to this Court a jurisdiction previously exercised only by Courts of Equity. It is therefore important, as a guide to this Court, to see what the course in equity is. There are two species of accounts in equity, quite different in their nature. One is an account, ordered to be kept by the defendant himself, of what he shall do in future; the other is an account of by-gone matters, ordered to be taken before the Master. The first is an interlocutory proceeding, which the Court of Equity orders as a condition to dissolving an injunction, and which never is ordered at all unless where there is an injunction. The other is at the final decree, as a means for granting relief; and the Master takes the account as a substitute for a jury in assessing damages. But such an account as the present rule orders, being not properly an account, but a discovery of by-gone transactions, was never ordered by equity at all. The Patent Law Amendment Act, 1852, sect. 42, seems intended only to give the Courts of law the interlocutory jurisdiction of equity; the whole is to be done pending the action; and injunctions and inspections are both interlocutory matters; and the account must be understood to be an account of the same kind. [*Crompton J.* There are injunctions granted during the pendency of the suit, till the title is ascertained, generally dissolved on the terms of the defendant keeping an account. There are also perpetual injunctions granted finally when the suit is at an end, and a final

(a) 1 Macn. & G. 286.

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account then taken. Your construction of the would give the Court at common law power the one, and would send the plaintiff into equity the other. But surely the scheme of the Legislature was to enable the Court, in which the cause brought to terminate it. Lord Campbell C. J. The very being to put an end to the inconvenient and ex oscillation from law to equity, you ask us to construe the section so as to defeat it.] At all events the orders more than was ever done in equity. *Temporary Injunction of Carlisle v. Wilson* (a) was a bill of discovery in aid of an action at common law, and was a different case from the present. The principle which equity gives relief in cases of tort is explained in *Jesus College v. Bloom* (b), by Lord Hardwicke who says: "The first question is, whether bills of discovery to be entertained merely for satisfaction for time being, after the estate of the tenant that cut it off is determined, by assignment, or otherwise, without the necessity of an injunction. I am of opinion they ought not to be granted. The ground of coming into this Court is, to prevent waste, and not by way of satisfaction for the damage done, but by way of prevention of the wrong, which Common Law cannot do in those instances, where a prohibition will not strictly lie. But in all these cases the Court has gone further, merely upon the ground of preventing multiplicity of suits, which is the reason which determines this Court in many cases. As in the case of an account of assets, &c. that originally was only a bill of discovery, which cannot be had without an account, therefore the Court will make a complete decree

(a) 13 Ves. 276.

(b) 3 Atk. 26

give the party his debt likewise. So, in bills for injunctions, the Court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here." In *Crossley v. Beverley* (a) there was ground for an injunction; and the relief was made complete. Here there is none.

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Cur. adv. vult.

Lord CAMPBELL C. J. now delivered judgment.

We are of opinion that the rule of 17th *January* 1854 ought not to be entirely set aside, but that it ought to be very materially modified. The plaintiff, having brought an action for the infringement of a patent of invention, conducted it in the usual manner till trial, without any application to the Court under stat. 15 & 16 *Vict. c. 83. s. 42*. At the trial he recovered a verdict and damages, without any reference to that statute, as he would have done before the statute passed.

He now prays for an account of all umbrellas &c. ever made and sold by the defendant, containing any thing which is to be considered an infraction of the plaintiff's patent; and that the defendant may be ordered to pay over to him all the moneys received for these umbrellas &c., and the value of all such umbrellas &c. which the defendant has made and which remain unsold. We conceive the meaning of the Legislature, in the enactment relied upon, to have been to vest in the Courts of common law, in which actions for the infringement of patent rights may be brought, the power to order an injunction, inspection and account, heretofore exclusively exercised by Courts of equity;

[(a) Note to *Sheriff v. Coates*, 1 *Russ. & M.* 166.

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so that suitors may be saved the vexation, delay and expense to which they had before been exposed, being obliged to go to a Court of equity for an action, then being sent to law to establish their legal title, and then being compelled to go to a Court of equity for full redress. The Court, in which the suit is commenced, may now by its own authority do complete and final justice between the parties by this combination of judicial powers. But the plaintiff altogether failed in shewing that, after a verdict for damages, large or minute, has been recovered in an action at law, a Court of equity has subsequently entertained a bill, at the suit of the same plaintiff against the same defendant, without the allegation of any infringement having been committed or threatened, has ordered such an account as is now prayed, or such an order for payment of money. The result of the proposed proceeding could be no just measure of either of the loss sustained by the plaintiff by reason of the infraction, or of the profit received by the defendant for which he might be considered a trustee for the plaintiff. The only accounts that a Court of equity would grant, we conceive, would be by interlocutory order, an account of the articles sold by the defendant during the suit; and, under certain circumstances, in the final decree an account to be taken before the Master of the profits made by the defendant from the sale of the pirated articles. We do not think that the Legislature has used any language which authorizes to grant the rule prayed. All the loss which the plaintiff sustained prior to the commencement of the action, and all the loss for which damages could have been given to him by the jury, must be considered as

pensated by the sum, however small, which they awarded to him, the verdict having been taken in the manner and under the circumstances stated.

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But it appears by the affidavits that, the action having been commenced in *February* 1853, in *January* 1853 there was a negotiation between the parties respecting the taking of a licence: that, in *July*, notice was given to the defendant that the plaintiff would require an account of profits subsequently made by him from using the plaintiff's invention: that the defendant by his own confession did thus make large profits for three months before the trial, and for two days longer, till 17th *December*, when he ceased to manufacture umbrellas according to the plaintiff's patent. We think that we have authority to order, and that we ought to order, an account of these profits.

Objection is made that we have now no jurisdiction to order any account; the words of sect. 42 of stat. 15 & 16 *Vict. c. 83.* being "it shall be lawful for the Court *in which such action is pending*," and the defendant arguing that this action is no longer pending in this Court. But we think that the action is pending, till final judgment has been pronounced and entered up. Till final judgment there cannot be any order for an account of profits; and any prior account, ordered to be kept of sales pending the action, can only be ancillary to this account of profits; the interim account of sales becoming nugatory if there should be a verdict and judgment for the defendant. But, in analogy to what is done in Courts of equity, we are of opinion that an account of profits may then be ordered. A bill in equity praying for an injunction against the infringement of a patent always contains a prayer that such an account may be decreed; and a Court of equity, exercising a very wide discretion, by

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the decree directs, or does not direct, such account if it does, then from such time and in such form as justice of the case seems to require.

Then, the defendant having admitted that, after being charged with the infringement of the plaintiff's patent and after notice that he would be held liable to account for the profits, he did make large profits by continuing to infringe the plaintiff's patent, and as no part of the profits could have been awarded by way of damages to the plaintiff, we think that the defendant may be considered as trustee of these profits for the plaintiff. As a part of our final judgment, we order the defendant to render an account of these profits, and to pay over the amount to the plaintiff.

The rule which the defendant now seeks to set aside will be moulded accordingly.

A discussion as to the proper form of the rule having arisen, it was directed by the Court (Lord C. J., Coleridge, Wightman and Erle J., *Noves* 1854), with assent of counsel (*Webster* for the plaintiff, *Hindmarch* for the defendant), that the form of the rule should be settled by *Crompton* J., who, accordingly, ordered that it should be drawn up in the following

"Upon reading" &c., "it is ordered: That on the Masters of this Court do take an account of all profits made by the defendant by means of the infringement of the plaintiff's patent; and that the said defendant do pay to the plaintiff the amount of such profits; and it is further ordered that the residue of the rule in this cause on *Tuesday* the 17th day of *January* next, above mentioned" (last *Hilary*) "Term be discharged."

(a) See *Vidi v. Smith*, ante, p. 969.

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JUDKINS *against* ATHERTON.

PEARSON, in last Term, obtained a rule to expunge a suggestion entered under The Common Law Procedure Act, 1852, sect. 101, that the plaintiff had failed to proceed to trial though duly required to do so. By the affidavits it appeared that the plaintiff had given notice of trial for two successive *Liverpool Assizes* in 1853, and had not proceeded to trial at either. On 21st *February* 1854, defendant gave him notice to bring the cause on at the ensuing *Liverpool Assizes*. The commission day was 18th *March*, 1854.

Cowling now shewed cause. The whole turns on the construction of The Common Law Procedure Act, 1852 (15 & 16 *Vict. c. 76.*), sect. 101, which enacts that, when plaintiff has neglected to bring the issue on to be tried in the time there limited, "the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or assizes, as the case may be, next after the expiration of the notice; and if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do." In the present case there was twenty days' notice before the time for proceeding to trial, but not twenty days' notice before the time for giving notice of

Under the Common Law Procedure Act, 1852, sect. 101, the defendant may enter a suggestion that the plaintiff has failed to proceed to trial, although duly required to do so, if defendant has given the plaintiff twenty days' notice to bring the issue on for trial at the sittings or assizes, and plaintiff afterwards neglects to give notice of trial for such sittings or assizes or to proceed to trial. Held, that the notice required by the Act is twenty days' notice before the sittings or assizes, and not twenty days' notice before the time for plaintiff to give notice of trial for that sittings or assizes.

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trial, that is the 8th of *March*. There has difference of opinion at Chambers as to the construction of the section. It all turns on the sense to be put on the word "afterwards." It is clear that the intention of the Legislature was to place the plaintiff in the same position as if he had given a peremptory undertaking under the old law: and for that purpose it was necessary that he should have notice. But twenty days before the sittings or assizes is exactly double the notice which a defendant, who is not in default, is entitled to, surely ample. And the grammatical sense of the section bears this meaning. [*Crompton J.* It does, if you put in the position of a comma. Punctuate the section if the plaintiff afterwards neglects to give notice for such sittings or assizes or to proceed to trial in pursuance of the said notice given by the defendant, and the meaning is as you say. He has had twenty days' notice to bring on the trial for the assizes after the expiration of that notice. To do so, he must give notice of trial and he must proceed to trial if he fails to do either in pursuance of the notice the defendant may enter the suggestion.]

Parva comma. - "Afterwards neglects to give notice of trial" must mean after the last antecedent, after the expiration of the notice.

LORD CAMPBELL C. J. I entertain no doubt that Mr. Gifford's is the reasonable construction. The service of twenty days' notice to the plaintiff is to place him in the same position as if he had given the undertaking to trial at the sittings or assizes next after the expiration of the notice, the plaintiff is to be in the same position as he would have been formerly

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COLERIDGE J., ERLE J. and CROMPTON J. concurred.

Rule discharged.

The QUEEN *against* The Trustees of The
WORTHING and LANCING Turnpike Road.

ON appeal against an order of two justices of the western division of *Sussex*, dated 22d June 1853, By a local and personal public Act (1 & 2 G. 4. c. lix.), *W.*, a

hamlet in the parish of *B.*, was constituted a town, but was still to continue part of the parish of *B.*, and, as such part, was to be charged with all rates, tithes and other payments as before the Act. Commissioners were appointed for the government of the town; and it was enacted that, as soon as any street, way, &c., within the town, previously repairable by the surveyor of *B.*, should be repaired by the Commissioners, the surveyor of *B.*, so long as it was kept repaired by the Commissioners, should pay the Commissioners a part of the highway rate of *B.*, proportionate to the part situate in *W.*

By another local and personal public Act (7 G. 4. c. x.), trustees were appointed for protecting from the overflowing of the sea, and otherwise improving and maintaining, an ancient road running through *W.*, which, before the first mentioned Act, was repairable by the surveyor of *B.*; whether ever repaired by the Commissioners, did not appear. The trustees had the power to take tolls upon the road, and other powers ordinarily given to turnpike road trustees: and the road was called in the Act a turnpike road. The trustees were also, by their works, to protect from the sea certain lands in *B.*, and were to receive from the owners a fixed sum to be levied upon them by rate. The Act saved the power of the Commissioners, except that they were freed from the expence of maintaining so much of the road as lay within *W.*

Held: (1) That the trust was a turnpike trust within the meaning of stat. 4 & 5 Vict. c. 59., authorizing the application of a portion of highway rates to turnpike roads.

(2) That the inhabitants of *W.* were not, by the Act last mentioned, exempted from the liability to apply the highway rate to the turnpike road.

W. was constituted a district within The Public Health Act, 1848 (11 & 12 Vict. c. 63.), and a local board was appointed. The turnpike trust funds being insufficient for the repair of the road, justices, under stat. 4 & 5 Vict. c. 59. s. 1., made an order on the surveyor of *B.* to pay to the trustees a portion of the highway rate of *B.* to be laid out in the repair of a part of the road situate in *W.*

Held: (3) That, as by sect. 117 of The Public Health Act, 1848, The Local Board were exclusively the surveyors of the highways of *W.*, the order was bad, and that The Local Board might be ordered to contribute to the expence of the turnpike road within *W.*, by a highway rate to be levied by them on *W.*, although, under sects. 86, 87, they could not apply the district rates to that purpose, and although, under sect. 68 (interpreted by sect. 2), the turnpike road was not vested in them or under their management. And that the inhabitants of *B.* without *W.* were not liable to the application of their highway rate to the repair of the turnpike road within *W.*

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whereby it was adjudged and ordered that a portion (to wit the sum of 250*l.*), part of the assessment to be levied, by virtue of stat. 5 & c. 50. (a), in the parish of *Broadwater*, should be by the surveyor or surveyors of the highways of parish unto the respondents, or unto their treasurers or before 1st *August* then next, to be by the respondents wholly laid out in the actual repair of such part of *Worthing* and *Lancing* Turnpike Road as lay within the said parish of *Broadwater*, the said order was subject to the opinion of the Court of Queen's Bench in the following case.

The hamlet of *Worthing* has always been contained within, and formed part of, the parish of *Broadwater*.

In 1821, by a local Act (1 & 2 *G.* 4. c. lix.) (b) commissioners were appointed for the general improvement of *Worthing* aforesaid, therein called and contained the town of *Worthing*. And it was thereby (sect. 3) that the said town should be coextensive with the said hamlet of *Worthing*, and that it should notwithstanding the said Act, continue to be part of the parish of *Broadwater*, and be subject to and charged with all rates, tithes and other payments whatsoever of the said parish, in like manner as before the passing of the said Act.

(a) Sect. 27.

(b) Local and personal, public: "To repeal two Acts made in the 4th and 49th years of his late Majesty, for paving the town of *Worthing* in the county of *Sussex*, and establishing a market therein, and for making other provisions in lieu thereof; for erecting groynes, for laying a drain into the said town, and for other purposes relating to the improvement of the said town."

By sect. 30 of the said Act, it was enacted that, when and as soon as any of the streets, lanes, ways, passages and places within the said town, which, before the passing of certain other Acts (*a*) relating to the management of the said town (and which were thereby repealed), were repairable by the surveyors of the highways of the said parish of *Broadwater*, should be repaired and amended by the commissioners of the said town, the said surveyor should, yearly and every year thereafter, so long as the said streets, lanes, ways, passages and places should be kept, repaired and amended by the said commissioners, pay or cause to be paid to the said commissioners a proportionate part, according to the respective lengths of such streets, lanes, ways, passages or places, and of the other parts of the highways in the said parish, of the highway rate annually raised in the said parish.

Within the limits of the said town of *Worthing*, so defined as aforesaid, is a certain ancient road or public highway, leading from *Warwick Buildings* in the said town towards *The Horse Shoes* inn in the parish of *Lancing*, which was repairable by the surveyor of the highways of the parish of *Broadwater* prior to the passing of the said two Acts so repealed as aforesaid (*a*).

In 1826, an Act of Parliament was passed (7 G. 4. c. x. (*b*)), entitled "An Act for making and maintaining a turnpike road from *Worthing* to *Lancing* in the county of *Sussex*, and groynes, embankments and other sea-defences, for protecting such road and the lands adjoining

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(*a*) Stats. 43 G. 3. c. lix., 49 G. 3. c. cxiv., both local and personal, public. (The title of the later Act has been, by mistake, interchanged with that of c. cxv. of the same year.)

(*b*) Local and personal, public.

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from the future encroachments of the sea." W after reciting (a) that many parts of the said road late years been frequently injured and rendered passable by the overflowing of the sea, and certain adjoining such road, and situate in the said t *Worthing*, and in the parishes of *Broadwater*, and *Sompting*, and the hamlet of *Cokeham*, all in county, had been likewise damaged by the same and that the said road and lands were still exposed to similar accidents, and that it was expedient for the benefit and convenience of the public that such roads should be in some places diverted, widened and improved, and that the said road, as well as the said lands, should be protected from the future overflowing and encroachment of the sea, by groynes, embankments, and other sea-defences, and that the same should be made a turnpike road, certain trustees were appointed for carrying out the objects of the said Act (b): and powers for making and maintaining the said road, and for taking and regulating tolls (c), were given to the said trustees and their successors, together with power (d) to erect groynes, embankments and other sea-defences; and (e),

(a) Sect. 1.

(b) Sect. 1 enacts "That the said road shall be called 'The *Worthing and Lancing Turnpike Road*.'"

(c) Sect. 9: "to demand, receive, and take, at the turnpike gate" &c.

(d) Sect. 19: "for the protection of the said road and the lands adjoining."

(e) Sect. 32. The parts of this section material to the decision in the case were the following. "That for the purpose of enabling the said trustees to defray the expences of preparing, and obtaining this Act, and of procuring the surveys and plans pro

protection of the said lands, to levy and assess upon the owners thereof annual rates, to be applied, with the said tolls, to the general purposes of the said trusts (a).

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thereto, and to make, improve, and maintain the said road, and the said embankment across or over *Sea Mills Common* or *Brooks*, and effectually to protect and defend the same and the lands adjoining from the future encroachments of the sea, by means of groynes, embankments, drains, bridges, sluices, and other sea defences, and to carry this Act into execution, there shall be raised annually the sum of 182*l.* 19*s.* sterling, by a rate or assessment to be made in manner hereinafter mentioned, on the several owners and proprietors of the said lands which have heretofore been injured by the overflowing of the sea, and are set forth in the schedules" &c.: the mode of assessment is then laid down.

(a) Sect. 45 enacts: "That it shall be lawful for the said trustees to borrow and take up at interest, upon the credit of the tolls and rates or assessments arising by virtue of this Act, such sum or sums of money as they shall think fit, and they may and are hereby empowered to demise or mortgage the said tolls and rates or assessments, or any part or parts thereof, and the turnpikes and toll houses for collecting the same tolls (the costs and charges of such mortgages to be paid out of such tolls and rates or assessments), as a security to any person or persons, or their trustees, who shall advance such sum or sums of money."

Sect. 55 enacts that out of the moneys subscribed and advanced, or which should thereafter be subscribed and advanced, for the purposes of, or borrowed on the credit of, the Act, the trustees should, in the first place, pay all costs incidental to the passing of the Act, with interest on all moneys advanced, and then all money expended in making the road and embankment across *Sea Mills Common* or *Brooks*, or in making groynes, embankments, sea defences, toll gates, turnpikes, side gates, &c., "and other matters and things necessary or requisite for carrying the purposes of this Act into execution;" the remainder to be invested in a permanent capital or fund: "and that all other moneys whatsoever which shall arise either from the tolls or rates or assessments by this Act granted, or by way of interest upon the said capital or fund, shall be applied in amending, sustaining, adding to, and keeping in repair the said road, groynes, embankments, sea defences, toll houses, toll gates, and other works, matters, and things hereinbefore particularly specified:" 50*l.* to be annually appropriated to the capital: the remainder to be applied in discharging the interest upon moneys subscribed, advanced or borrowed, then to the

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And it was also thereby provided and enacted 57) that nothing in that Act contained should extend to be deemed or construed to extend, to prejudice, diminish, alter or take away any of the rights, powers, or authorities vested in the Commissioners, for the time being, under the authority of the said Act of 1 & 2 G. 4. c. 61, but all the rights, powers and authorities vested in the Commissioners should be as good, valid and effectual as if the said Act had not been made; save and except in so far as they, the said Commissioners, should from thence be freed and discharged of and from the expences of making and maintaining so much of the said road as is situate within the said town of *Worthing*, and of making and maintaining groynes, embankments and other defences for the protection of the same.

The said road was accordingly converted into a turnpike road, and was widened, raised and diverted in pursuance of the provisions of the said Act. The portion of that portion of it which forms the subject of the order of justices lies within the limits of the said town of *Worthing*, and, from time to time during the last few years, has been damaged by the encroachment of the sea: and at certain points the road itself has actually been carried away; and a new portion of road was in the winter of 1852, substituted.

maintaining the capital so long as the sum invested on account of the same should not amount to, or should be reduced below, 1000*l.*; and to repay the principal moneys subscribed, advanced and borrowed.

Sect. 56 enacts that the expences lately incurred by three proprietors (named) of parts of the lands in making a sluice should be defrayed by the trustees "out of the moneys to arise under or by virtue of this Act."

The surveyor of the parish of *Broadwater* has annually paid, since the passing of the *Worthing* Town Act, 1 & 2 G. 4. c. lix., a certain sum of money to the Commissioners of the said town out of the general highway rate of the said parish of *Broadwater*, as and by way of contribution towards the expense of repairing such parts of the highways lying within the limits of the said town as the said Commissioners had taken upon themselves to repair. And the said surveyor has, from the year 1834, paid to the said respondents the yearly sum of 27*l.* 10*s.*, up to the month of *November* 1852, when such payments altogether ceased.

In the last mentioned year 1852, by an Act of Parliament (*a*), the town of *Worthing* as a district was brought within the provisions of The Public Health Act, 1848: and a Local Board was appointed, which, it was declared (sect. 117 (*b*)), should, within the limits of their district, exclusively of any other person whatever, exercise the office of the surveyor of highways, and have all such power, authorities, duties and liabilities as any surveyor of highways in *England* was then, or might thereafter be, invested with, or be liable to, by virtue of his office, by the laws in force for the time being, except in so far as such powers, duties or authorities were or might be inconsistent with the provisions of that Act (*b*): and the inhabitants of any district should not, in respect of any property situate therein, be liable to the payment of highway rate, or other payment not being a toll, in respect of making and repairing roads or highways within any parish, township or place,

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(a) 15 & 16 *Vict.* c. 42., confirming a Provisional Order of The General Board of Health, dated 17th *June* 1852.

(b) Of The Public Health Act, 1848 (11 & 12 *Vict.* c. 63.).

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Portions of the original turnpike road in que well as the substituted new parts of it, within the *Worthing*, being out of repair, arising from the er ments of the sea, and the revenues accruing respondents by virtue of stat. 7 G. 4. c. x. havin divers causes become quite insufficient to maini said road, and keep up the said groynes and sea-de application was made to the justices aforesaid, stat. 4 & 5 Vict. c. 59.; and the order appealed was made by them; the proper notice of such in proceedings having been served upon the appell surveyor of the highways of the said parish of . *water*; but no notice thereof having been at an served upon the Board of Health at *Worthing*.

The following (amongst others) were the r grounds of appeal.

1. That the road in question was not a turnpik within the meaning of stat. 4 & 5 Vict. c. 59.

2. That the appellant had no authority, unde 5 & 6 W. 4. c. 50., to pay the sum of 250*l.*, , other sum, out of the highway rates to be levied l by virtue of the last mentioned Act of Parliam the said parish of *Broadwater* for the repairs of tl road.

3. That, the town of *Worthing* being a district The Public Health Act, The Local Board of for such district being under such Act the surve the highways of such district, which is part of the of *Broadwater*, the said order was bad, because no was given to the said Local Board, as such survey the intended application for such order.

4. That, since the town of *Worthing* had been constituted a district under 'The Public Health Act, it was not competent to the said justices to make an order on the surveyor of highways of the said parish of *Broadwater* to raise money within the said district for the repairs of the said road.

5. That the appellant was only surveyor of that part of *Broadwater* which is not within the district of *Worthing*, and not of the whole parish as supposed in the said order.

6. That the town of *Worthing*, part of the parish of *Broadwater*, was and is a district maintaining its own highways; and that the road in question is wholly situate within such town and district of *Worthing*; and that, under stat. 4 & 5 *Vict. c. 59.*, if the said order could be made on any one, it could only be made on The Local Board of Health of such district of *Worthing*, as surveyors of the highways of such district.

7. That the said order was bad, inasmuch as it virtually repealed the 57th section of the said *Worthing* and *Lancing* Turnpike Road Act, and the 117th section of The Public Health Act, 1848, and the provisions of the said Act of 5 & 6 *W. 4. c. 50.*

Each of the above named Acts of Parliament to be deemed part of the present case, &c.

The questions for the opinion of the Court are :

First : Whether such notice ought to have been served upon The Board of Health of *Worthing*.

Secondly : Whether the order was rightly made, or whether it ought to have been made on The Board of Health of *Worthing* alone, or on the said surveyor jointly with the said Board of Health.

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Thirdly: Whether stat. 4 & 5 *Vict. c. 59.*, continued by subsequent statutes (a), applies to *Worthing and Lancing Turnpike Road*.

If the Court should be of opinion that notice not have been served on the Board of Health of *Worthing*, and that the order of justices was rightly made, and that stat. 4 & 5 *Vict. c. 59.* (as continued) applies to the *Worthing and Lancing Turnpike Road*, then the order of quarter sessions is to be quashed, and the original order of justices to be confirmed. If the Court should be of opinion that notice ought to have been served on the Board of Health of *Worthing*, or that the order of justices ought to have been made on the said Board, either alone or jointly with the surveyor, and not as aforesaid, or that stat. 4 & 5 *Vict. c. 59.* (continued &c.) does not apply to the *Worthing and Lancing Turnpike Road*, then the said order of quarter sessions is to be confirmed, and the original order of justices is to remain quashed.

The case was argued in last *Easter Term* (b).

J. J. Johnson and *H. P. Wyatt*, in support of the order of Sessions.

The order of the justices was made under stat. 4 & 5 *Vict. c. 59. s. 1.*, which applies only to turnpike roads. Now, although stat. 7 *G. 4. c. x.* uses the words "turnpike road,"

(a) The latest of these statutes in force at the time of the order made on June 1853 was 15 & 16 *Vict. c. 19.*, continuing stat. 4 & 5 *Vict. c. 59.* to 1st October 1853. The statute was continued, by stat. 16 & 17 *Vict. c. 19.* to 1st October 1854, and the end of the then next Session of Parliament, and, again, by stat. 17 & 18 *Vict. c. 52.*, to 1st October 1860, and the end of the then next Session of Parliament.

(b) May 6th, 1854. Before Lord Campbell C. J., *Wight v. Crompton* &c.

road," and gives to the road in question several of the properties of a turnpike road, it does not follow that the trust falls within stat. 4 & 5 *Vict. c. 59. s. 1.*, which seems confined to such as are trusts for turnpike roads and no more. Now sect. 1 of stat. 7 *G. 4. c. x.* recites that the road has been injured, and lands damaged, by the overflowing of the sea, and expresses that one purpose of the Act is that the said road, as well as the said lands, for the benefit of the owners thereof, should be effectually protected from the future overflowing and encroachment of the sea, by groynes, embankments, and other sea-defences. Sect. 19 gives power to erect works "for the protection of the said road and the lands adjoining." Sect. 32 authorizes the raising of a given sum by a rate on the owners of lands which have theretofore been injured by the overflowing of the sea, which sum is to be applied indiscriminately to the making and maintenance of the road and the sea-defences. Sect. 45 authorizes the trustees to borrow money on the credits of the tolls and rates; and no distinction is made, by sect. 55, between the application of the money borrowed or raised by tolls and rates to the road and to the sea-defences. So the money, without distinction as to the mode of obtaining it, is to be applied, under sect. 56, to defray the expences incurred by certain parties in making a sluice. The very deficit here may have been occasioned by expences quite unconnected with the maintenance of the road.

But, if stat. 4 & 5 *Vict. c. 59.* be applicable, the order is improperly made on the surveyor of the parish, who cannot lay a rate on the whole parish, including the district of *Worthing*, since, by sect. 117 of The Public Health Act, 1848 (11 & 12 *Vict. c. 63.*), The Local

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Board of Health are, exclusively, the surveyors of the town district. There is nothing in the Acts which exempt the inhabitants of the town from the liability to contribute. Sect. 57 of stat. 7 G. 4. c. x., it is true, exempts the Commissioners under the previous Act, 1 & 2 G. 4. c. x. from the expence of maintaining so much of the roads as is within the town: but the effect of this is, not to exempt the inhabitants of the town, but only to shift the liability of the roads of the Commissioners, if they ever were liable for this road, to the trustees under stat. 7 G. 4. c. x. If the trustees were to provide for the repairs of the whole road by the exercise of the powers given to them by the last mentioned Act. But it does not appear, indeed, that the Commissioners at any time were bound to perform the repairs; and the liability, by sect. 30 of stat. 1 & 2 G. 4. c. lix., is only in respect of such roads as they had adopted for performing repairs: and the case does not shew that they had so adopted the road now in question. At any rate, whatever exemption the inhabitants of the town were entitled to under sect. 57 of stat. 7 G. 4. c. x. can exist only to the extent to which the work was performed by the Commissioners.

Then the expence properly falls on The Local Board of Health, which, by sect. 117 of stat. 11 & 12 G. 4. c. 63., has the "powers, authorities, duties, and liabilities," throughout the district comprehending those which surveyors of highways have. The inhabitants of the district, by that section, are not liable to a rate (tolls excepted) in respect of roads in the parish or their district: the Legislature must have intended that they should be liable for all in their district, and that is not necessary for the decision of this question. It is exclusively so. Under sect. 68 the streets are ve-

and are under the management of, The Local Board: and 1854.
 "streets," by the interpretation clause, sect. 2, includes The QUEEN
 any highway, not being a turnpike road. This road, V.
 therefore, is still under the controul of the trustees: but WORTHING
 they, under stat. 4 & 5 Vict. c. 59., are to obtain assist- ROAD
 ance from the surveyors, that is, in this instance, The Trustees.
 Local Board. The Local Board, therefore, though
 probably they cannot, under sects. 86, 87 of stat.
 11 & 12 Vict. c. 63., give this aid from a district rate,
 may lay an ordinary highway rate for the purpose.

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 pike road within the meaning of stat. 4 & 5 Vict. c. 59.
 Stat. 7 G. 4. c. x. s. 1. so denominates it. It is true that
 there are other purposes, besides that of maintaining
 the road, to be answered by the Act: but the road
 itself has all the qualities of an ordinary turnpike road.
 Sect. 9 gives power to take tolls at the turnpike or toll
 gate: sect. 45 authorizes the mortgage of tolls, a very
 common incident to turnpike roads. Sect. 32, in
 respect of the advantage to be gained by the lands
 protected, subjects them, not to a varying liability, but
 to a fixed payment in aid of the ordinary turnpike road
 fund. [Lord Campbell C. J. I believe we are all of
 opinion that this is a turnpike road within stat. 4 & 5
 Vict. c. 59.]

Next, the language of sect. 57 of stat. 7 G. 4. c. x.
 seems to shew that the Legislature intended to give
 this road altogether a different character, in respect of
 the powers and liabilities relating to it, from that of the
 other roads in the district which were under the controul
 of the Commissioners.

As to the liability of The Local Board of Health: it

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seems that the Legislature, by sects. 2 and 6 11 & 12 *Vict. c. 63.*, meant to reserve the assets and liabilities of the trustees of turnpike roads. *ton J.* In sect. 117 you find that it was thought necessary, where the inhabitants of a district are exempt from liability as to "any highway rate or assessment" in respect of repairing roads or highways within the district, to except from this protection "expressly; as if the general terms of the enactment relating to turnpike roads." The road in question is not within that provision: it applies only to roads within the district. There is no power expressly given to the Local Board to raise money for this purpose; their powers being statutable only, they can have no power at all. Nor does any difficulty arise from the inability to repair the road: the common law duty of the parish, attaches. The case raises other questions as to notice: but it seems that the outcome of these will depend upon the decision on the other points.

Cur.

Lord CAMPBELL C. J., in this term (*M*) delivered the judgment of the Court.

At a special session for the highways, the Court made an order under stat. 4 & 5 *Vict. c. 59. s. 1.* that the surveyor of the highways of the parish of *Broadwater* should pay for payment of a sum of money to the trustees of the turnpike road to be laid out in the repair of a part of a turnpike road within the town of *Worthing* in the parish of *Broadwater*. The quarter sessions, upon appeal, quashed the order, subject to the opinion of the Court upon the facts stated in a special case.

Upon the argument of this case, three questions were raised for our consideration: 1st. As to whether the Act in question was a turnpike Act, within the meaning of stat. 4 & 5 *Vict. c. 59.*; 2dly. As to the effect of the 57th section of stat. 7 *G. 4. c. x.*, which, it was said, discharged the town of *Worthing* from the making and maintaining the road in question; and, 3dly. and principally, on the effect of The Public Health Act on the liability to contribute to the repairing of the road.

With regard to the first question, we intimated our opinion, during the argument, that the road was a turnpike road, within the meaning of stat. 4 & 5 *Vict. c. 59.* It was argued that the making the groynes for the defence of the road was also an advantage to the owners of the lands, which those groynes would defend from the incursions of the sea, and that money expended by the trustees upon those groynes would enure to the benefit of those lands, as well as to the benefit of the turnpike road. But the owners were to pay a definite annual sum, correctly and properly estimated as we must suppose, with reference to the advantage they would derive. This sum would be in ease of the persons bound to repair the road: the Act expressly constitutes it a turnpike road: and we see no reason whatever for thinking that this is not a turnpike trust within the meaning of stat. 4 & 5 *Vict. c. 59.*

With regard to the second point, it was contended that the exception at the end of the 57th section of this same turnpike Act had the effect of entirely relieving the town of *Worthing* from the liability of maintaining the road. The provision in question is contained in a clause for saving the rights of the Commissioners of the

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town of *Worthing* under a former Act of Parliament, and the clause in question enacts that the rights and authorities vested in those Commissioners shall be good and valid, save and except that the Commissioners shall be freed and discharged from the expence of and maintaining so much of the road as is situated in the town of *Worthing*, and of making and maintaining groynes, embankments and other sea defence for the protection of the same. We construe this enactment as taking the road out of the controul of the Commissioners, it being made by the other parts of the Act as if the road under the management of the turnpike trustees. Before the passing of the turnpike Act, the road was under the management of the Commissioners under the prior Act; and it was proper, in subjecting the management of the turnpike trustees, to say that the Commissioners should no longer have the controul of it, and should be freed from the obligation of maintaining it. The effect seems to be that the management of the road was transferred from the Commissioners to the turnpike trustees: and the road became in the nature of a turnpike road under the management of trustees. The trustees, under the statute, to seek relief from the parish in case of deficiency of their funds, the road remaining liable to indictment at common law for the repair of the road.

Assuming, then, that the road in question was a turnpike road within the meaning of stat. 4 & 5 *V. 2*, and that the liabilities of the surveyors of the road were, after the passing of the turnpike Act, the same as in the case of ordinary turnpike trusts, the question, which is one of some difficulty and of general importance, is as to the effect of The

Health Act when the town of *Worthing* became a district under the provisions of that statute.

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By the 68th section of The Public Health Act, 1848, the streets, which by the interpretation clause (a) includes all highways not being turnpikes, are vested in The Local Board, who are charged by the Act with the levelling, paving, flagging, channelling, altering and repairing the same. Turnpike roads appear to have been excluded from these provisions, for the purpose of their being left under the controul of the turnpike trustees. We held, in *Elmer v. Norwich Local Board of Health* (b), that the expences of repairing the highways within the district, which are expressly charged by the Act upon the Local Board of Health, were to be defrayed by a district rate under the Act, and not by a highway rate. We are now to consider how the contribution for the repair of that part of a turnpike road which lies within the district of a local board of health, part of a parish, is to be raised.

By the 117th section of the Act, the local board, within the limits of the district, are, exclusively of any other person, to execute the office of, and be, surveyor of highways, and to have all the powers, duties and liabilities of surveyors of highways, except so far as inconsistent with the provisions of the Act. In the *Norwich* case (c), before referred to, we intimated our opinion that the local board became the surveyors of the whole district, and not the surveyors of any particular parish within the district. In the present case no question as to different parishes within the district arises,

(a) Sect. 2.

(b) Ante, p. 517.

(c) *Elmer v. Norwich Local Board of Health*, ante, p. 517.

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the whole district forming part of the parish of *water*. By the express words of this provision surveyors of the entire parish were excluded from executing the office of, or being, the surveyor of land within the district; and the local board are to have powers, duties and liabilities, except where inconsistent with the provisions of the Act. Then follows an important part of the 117th section upon which I counsel for the surveyors of the parish mainly relies. "And the inhabitants of any district shall not in respect of any property situate therein be liable to the payment of highway rate or other payment, not being in respect of making or repairing roads or highways within any parish, township, or place, or part of any township, or place, situate beyond the limits of the district." Nothing can be more strong than this provision, to shew that the local district is to be relieved from all rates or payments, not being in respect of the repair of all roads or highways within the spot beyond the limits of the district. The clause is not like the 68th section, which uses the word "road," explained by the interpretation clause to include ways exclusive of turnpike roads; but the clause uses the word "road," as if expressly to extend to all roads and not to be confined to highways, not turnpike roads, the management of which is vested in the local board. In addition, also, of the payment of tolls appears that turnpike roads were not excluded from this provision. The effect of this provision, exempting inhabitants of the district from the payment of the rate of any road out of the district, coupled with the preceding provision, by which the duties and liabilities of the surveyors of the district are thrown exclusive

the local board, appears to us to be that the liability, to contribute to repair in the event of a deficiency of the turnpike funds, is divided, and that the part of the parish without the district remains liable to contribute, in case of deficiency, to the repair of any part within the parish and not being within the district, whilst the district remains alone liable to such contribution for the repair of any part of the road within the district. After the words of the 117th section, which so expressly exclude any exercise of the powers of the parish surveyors within the district, and after the immediately subsequent provision which expressly relieves the inhabitants of the district from liability to any payment for the repair of any road beyond the limits of the district, it seems to us quite impossible to hold that the former powers of the surveyors of the entire parish remain so that they could make a general rate upon the inhabitants of the parish including the district for the repair of any part of the road situate in the parish of *Broadwater* without the district: and, if the whole parish cannot be made to contribute as to what lies out of the district, it would be manifestly unjust to the part of the parish without the district that the whole parish should be taxed for the repair of the part within the district of *Worthing*. And the statute takes away all power of the parish surveyors to interfere in the district. The only way of carrying out the intention of the Legislature appear to us to be, by holding that the two parts of the parish become entirely distinct for the purpose of contributing towards the repair of the turnpike roads, as well as for that of repairing the general highways: and we see no difficulty in The Local Board being ordered to

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by a district rate; whilst, in the note at page 187, he observes that the local board may still have to levy a highway rate for purposes other than the matters thrown on the district rate by the Act. The raising a sum of money for contribution towards the repair of a turnpike road seems a matter for which the local board would have to resort to the powers of rating under the Highway Act, transferred to them by the 117th section of The Public Health Act.

The order of the two justices in question, having been made against parties having no fund applicable by law to the purpose in question, and no power to raise such a fund, is bad. And the Court of Quarter Sessions were right in quashing this order. Our judgment is, therefore, that the order of Sessions quashing the order of the magistrates be confirmed.

Order of Sessions confirmed.

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ACCORD.

- I. Accord and satisfaction under agreement by parol after breach of award under submission by deed.

Declaration stated that by deed between plaintiff and defendant, who were partners, it was agreed that plaintiff should retire from the partnership, and it should be referred to arbitration what sum should be therefore paid by defendant to plaintiff: that it was awarded that a sum named should be paid by instalments: but defendant had paid only a part thereof.

Plea: that, after breach of the award by nonpayment of the first instalment, it was agreed between plaintiff and defendant that defendant

should not assist one *B.* in a certain claim which he was urging, and that defendant should pay, by instalments on certain days named, the last but one being 14th *April*, a sum in all amounting to less than the sum awarded; which agreement and the performance thereof plaintiff accepted in satisfaction of the sum awarded, and all causes of action in respect thereof, and the said breach: and that defendant paid plaintiff the instalments on the days named in the second agreement, which plaintiff accepted in satisfaction (as before), and in performance of the second agreement.

Held: that the deed of submission was merely inducement, and that the action was brought for breach of the award; and that therefore there might be accord and satisfaction under an agreement by parol, made after the breach by non-payment of the first instalment: and, consequently, that the defendant, in support of his plea, was not bound to shew an agreement under seal.

It appeared that the last payment but one under the second agreement was made on 19th *April*, not on 14th; and that, when it was made, plaintiff refused to accept it except as on account of the money due on the award, which, he contended, was still binding: but he made no objection to

the payment as having been made too late.

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that the vessel was leaky & unworthy, by which plaintiff unwell and sustained damages.

Held, on demurrer, that was bad, there being no all knowledge or deceit, nor express warranty that the vessel was seaworthy; and the law not any such warranty from the shipowner and seaman.

2nd count. That defendant lected to supply and keep the vessel a proper supplies, whereby plaintiff's health suffered.

Held, on demurrer, that s. 112. s. 18. makes it of the shipowner to have such medicines; and that, the Act imposes a penalty, recover a common informer, as the punishment for the breach duty as to the public, sailing a private injury from that of that statutable duty are maintain an action to recover damages. And that the count v. *Couch v. Steel*, 402.

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1. Cause of action accruing insolvency.

Count by a printer for not a printing machine according tract, whereby the trade of had been ruined, and he had

insolvent. Plea; that, after the accruing of the causes of action, plaintiff took the benefit of the Insolvent Debtors' Act, and the causes of action vested in the provisional assignee. Demurrer; and further replication, that the assignee had not intervened; on which was a rejoinder, and a demurrer to the rejoinder.

Held: that stat. 15 & 16 *Vict. c. 76. s. 142.* does not apply to actions commenced after the insolvency of the plaintiff; and that the non-interference of the assignees is immaterial where the cause of action accrues before the insolvency; and therefore the replication was not an answer to the plea.

Held, also, that the cause of action disclosed in this count, and the special damage there alleged, were wholly injury to the estate of the plaintiff, and not personal damage; and, consequently, that the whole cause of action passed to the assignee, and the plea was good. *Stanton v. Collier*, 274.

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Plaintiff declared against defendant for maliciously and without reasonable or probable cause issuing a warrant under his hand and seal, and procuring plaintiff to be arrested. Plea: Not Guilty, by stat. 11 & 12 *Vict. c. 44. s. 10.* The notice of action stated, as cause of action, that defendant, with force and arms, caused plaintiff to be assaulted and beaten, apprehended and imprisoned, without reasonable or probable cause (not alleging malice).

The evidence was that defendant, being a justice, in a matter within his jurisdiction, issued a warrant under which plaintiff was apprehended; and it was sought to shew that this was done maliciously.

Held: not a good notice under sect. 9 of stat. 11 & 12 *Vict. c. 44.*, as the cause of action insisted on was under

sect. 1., but the notice did not point clearly and explicitly to such a cause of action, but rather to a complaint under sect. 2, for acting without jurisdiction. *Taylor v. Nesfield*, 724.

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Under what circumstances he is to be considered as having purchased on his own account and resold to his principal.

Defendants, merchants resident in Ireland, wrote to S. A., a merchant resident in London, authorizing him "to take for us two cargoes" of Ibraila corn 1000 to 1500 quarters at 24s. to 24s. 3d., "payment by our acceptance

at 2 or 3 months," and in postscript added, "You may go to 24s. 6d., if you find you cannot do the work at 24s. or 3d." S. A. made a bargain with R., a merchant resident in London, for a cargo by the C., and sent him a note commencing "Sold by order and for account of R. to our principals the cargo" of Bulgarian corn per C. at 24s. 6d. per quarter, cost, freight and insurance, "Sellers to pay a commission of two per cent. Payment in cash" in one week after receipt of documents. On the same day R. in his books debited S. A. with the price of the cargo, and sent S. A. the shipping documents with the bill of lading indorsed, and an invoice headed "S. A. bought of R." On the same day, S. A. wrote to defendants "to advise having purchased for your account the cargo of Bulgarian corn per C., at 24s. 9d. per qur. C. F. & I., which is 3d. per quarter over your limit for Ibraila, but proportionately cheaper." In this letter were inclosed the shipping documents of the C. (including the indorsed bill of lading), and an invoice headed "Invoice of a cargo, &c. bought by order and for account and risk" of defendants; and a draft for the price at 24s. 9d., drawn by S. A. on defendants. Defendants returned the draft accepted, stating in the letter, "We note purchase of corn per C. at 24s. 9d. We would much rather have had Ibraila at 24s. or 24s. 3d." After this, whilst the bill was still current, and before the arrival of the C., S. A. failed. R. stopped the cargo of the C., treating S. A. as the purchaser, and claiming to be an unpaid vendor to him. Defendants, on receiving an indemnity from R. against the bill, paid him the price less discount, at the rate of 24s. 6d., being less than the sum for which the bill was accepted, which was at the rate of 24s. 9d.

The assignees of S. A., who had become bankrupt, sued defendants on the bill. R. defended the action for them, on the ground that the consideration for the bill had failed. A case was stated for this Court, in which the correspondence, containing as above stated, was set out, and the

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Court had power to draw it of fact.

Held: that on the above it must be taken that, notwithstanding the form of the contract not the defendants' order to S. transaction was a sale from R. and a sale from S. A. to defendants and not a sale from R. to defendants through S. A. And this, reference to the fact that defendants resided in Ireland.

Held also that, the indorsing being assigned to defendants for value, R. had no right to transitu; that consequently the assignment of R. by defendants was own wrong; and that the consideration for the bill of exchange had failed and the plaintiffs were entitled to judgment. *Pennell v. Alexander*.

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- I. Common Law Procedure: amendment at trial.

Where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff, under The Common Law Procedure Act, 1852, is to apply at the trial for an amendment under sect. 37. The misjoinder is not such a defect or error as can be amended after the trial by the Court in banc under sect. 222. *Robson v. Doyle*, 396.

- II. Of indictments.

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On the trial of an indictment charging defendant with obstructing a footway leading from A. to C., it appeared that there was a way leading from A. to C., but that it passed through an intermediate point B., and that the way was a carriage way from A. to B. and a footway only from B. to C. The obstruction was between B. and C.

Held that, assuming this to be a misdescription, the indictment might, under stat. 14 & 15 *Vict.* c. 100. s. 1., be amended at the trial, by substituting a description of the way as a footway leading from B. to C. *Regina v. Sturge*, 734.

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Semle, that in cases in which jurisdiction to order costs on appeal is given only by stat. 12 & 13 *Vict.* c. 45. s. 5., the order may be enforced under sect. 18. if the order be in other respects valid.

Semble, also, that an order for costs in such a case may be valid, though ordering the costs to be paid to the party and not, as required by stat. 11 & 12 Vict. c. 43. s. 27., to the clerk of the peace. *Sed quare. Regina v. Humley*, 172.

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ARREARS.

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ARREST.

I. On final process, for more than due.

1. Remedy by action where the malice and want of probable cause.

Where it appears by the declaration that defendant has recovered a judgment for debt and costs, against plaintiff, and has issued a certificate indorsed to satisfy the whole of debt and costs, and afterwards debt itself has been satisfied (as where the judgment is recovered by holder of a bill of exchange against the acceptor, and the drawer, whose accommodation the bill has been accepted, pays to the holder amount due on the bill), so as to reduce the sum remaining due on judgment to a sum below 20s., that afterwards the defendant delivered to the sheriff's bailiff a warrant indorsed to satisfy the whole debt and costs, and has procured plaintiff to be arrested to satisfy whole, and there is an allegation of malice and want of probable cause and of special damage, by means of the premises, in the plaintiff being prevented from attending to his business, being injured in his credit, incurring expence in procuring liberation by a Judge's order, facts shew a good cause of action.

So held, on demurrer to the declaration. *Churchill v. Siggers*, 929.

2. Remedy where there is not malice or want of probable cause, *Ante*, 1.

3. Special damage, 929. *Ante*, 1.

4. For full amount after partial satisfaction, 929. *Ante*, 1.

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Declaration for malicious arrest for whole amount after part satisfaction, 929. *Ante*, I. 1.

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1. Of right of common, 859. *Coroner*.

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I. How far identified with the client.

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AUTHORITY.

I. Generally.

1. Distinguished from exercise of authority, 549. *Carrier*.

2. Excess : when it does not vitiate, I. *Bank*, II. 1.

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1. To transfer bill of lading, 622. *Bill of Lading*, I. 1.

2. To pay rates for occupier, 637. *Poor*, VIII. 1.

III. Of agent. *Agent*, III.

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BAILMENT.

I. Responsibility of different descriptions of bailees.

Boarding-house keeper.

Declaration, that defendant, being a boarding house-keeper, received plaintiff with her baggage, for reward, as a guest in defendant's house, on the terms, amongst others, that defendant should "take due and reasonable care" of plaintiff's baggage, whilst in the house. Breach : that by negligence of defendant and her servants plaintiff's baggage was lost. Pleas : Not Guilty ; and a traverse of the receipt on those terms. Issues thereon.

On the trial, it appeared that plaintiff was received, with her baggage, as a guest ; but nothing was expressed as to the care to be taken of the goods. The goods were stolen from the house whilst plaintiff was a guest ; and there was evidence that the theft was facilitated by the defendant's servant having left the front door ajar ; and there was also some evidence that defendant was aware of habitual negligence of the servant in this respect. The Judge told the jury that a boarding housekeeper was bound to take due and reasonable care about the

safe keeping of the guest's goods: which he explained to be such care as a prudent housekeeper would take of the house for the purpose of protecting her own goods: that the leaving the door ajar might be a want of such care; but that the defendant was not answerable for such negligence in the servant, unless she had herself been guilty of some negligence, as in keeping such a servant with knowledge of his habits. Verdict for defendant on Not Guilty: for plaintiff on the other plea.

On a rule for a new trial:

Held, by the whole Court, that a boarding housekeeper is not bound to keep a guest's baggage safely, to the same extent as an innkeeper; but that she undertakes, by implication of law although nothing is expressed, to take due and proper care of a guest's baggage; and that neglecting to take due care of the outer door might be a breach of such duty, and that so far the direction was right.

Erle J. and *Wightman J.* held that, unless the defendant herself was guilty of negligence, the act of the servant, in leaving the door ajar, was not one for which defendant was responsible; it not being a neglect of any public duty which was owing to plaintiff, and not being a breach of a contract between plaintiff and defendant, but merely negligence of the servant towards his mistress: and that therefore the direction was right.

Coleridge J. and *Lord Campbell C. J.* held that the act of the servant was, under the circumstances, the act of the defendant; and that there was no distinction between the personal negligence of the defendant, and that of her servant in her employment, the defendant being equally answerable for both: and therefore they held that the direction was wrong.

The Court being equally divided, no new trial was granted. *Dansey v. Richardson*, 144.

II. Negligence.

Of bailee's servant, 144. *Ante*, 1.

BANK.

I. Generally.

BANK.

Nature of the business, 1, II. 1.

II. Unregistered joint stock:

1. Ordinary purposes of company.

The directors of an unincorporated and unregistered joint stock company, called the R. Bank, made and issued promissory notes in this form.

"*R. Bank.*"

"We, directors of the R. Bank, for ourselves and the other holders of the said Company, and severally promise to pay the value received on account of promissory notes of the said Company." (Signed) "*A. Chai* and *C. Directors.*"

of *A.*"

Held that, assuming that the directors were authorized to issue promissory notes on account of the company, this form of note sufficiently an intention to create a partnership jointly; and that the attempt to bind the shareholders severally was ultra vires, and yet the shareholders were jointly.

An action was brought on the notes, which they were at five years' date, and attached to each were coupons for yearly interest at the rate of 5 per cent. till the principal sum became due. They were issued through a broker, employed directors; and the plaintiffs paid the full value. In the advertisement from the broker to the plaintiffs the transaction was called a sale of shares. The money thus was employed as capital, in branches of the Bank abroad, facts being stated in a case, the Court had power to draw inferences of fact:

Held: that, though the transaction was called "a sale of debentures," yet it appeared to be in substance a loan on the security of the shares, and that, assuming that the directors had authority to borrow on the security of the shares, the plaintiffs were covered against the shareholders' money lent.

BANK.

Held also: that the transaction appeared to be so much out of the ordinary course of banking transactions that the plaintiffs could not recover, merely on the implied authority given to the managers of a joint stock company to do all that was in the ordinary course of the business for which the Company was formed.

The deed of the Company authorized the establishment of branches of the bank in all places east of the *Cape of Good Hope*, and gave very full powers to the directors to manage the whole concern. It also provided that, for the first four years, there should be no general meetings. It appeared that, in fact, the money raised on the notes was employed in establishing branches; that, during the first four years, dividends were paid by the directors; and that afterwards, at three successive general annual meetings, dividends were voted, on the supposition that they were derived from the profits of these branches and received by the shareholders.

Held: that the deed authorized the directors to issue notes, and borrow money, as they had done, for the purpose of starting the branches.

Held also that, supposing it had not, the shareholders must, as an inference of fact, be taken to have ratified the means by which the directors had raised the capital for establishing the branches from which the dividends were derived: it appearing to the Court as a fact that they must have known that the capital was borrowed. *MacLae v. Sutherland*, 1.

2. What purposes and powers imply authority to raise capital by loan, 1. *Ante*, 1.

3. Ratification by acquiescence in balance sheets, 1. *Ante*, 1.

III. Unregistered joint stock: bills and notes.

Powers of directors to issue for ordinary purposes of the business, 1. *Ante*, II. 1.

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2. What loans not within the ordinary purposes, 1. *Ante*, II. 1.

3. Form purporting to bind the shareholders severally as well as jointly, 1. *Ante*, II. 1.

4. Irregularities, 1. *Ante*, II. 1.

5. Excess of authority by directors, 1. *Ante* II. 1.

6. Ratification, 1. *Ante*, II. 1.

7. What form sufficiently shews them to be the notes of the company, 1. *Ante*, II. 1.

BANKRUPT.

I. What causes of action vest in assignee.

Distinction between injury to estate and mere personal damage, 274. *Action*, II. 1.

II. Actions by bankrupt.

Application of stat. 16 & 17 *Vict.* c. 76. s. 142.: interference of assignees, 274. *Action*, II. 1.

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Removability, 596. *Poor*, XI.

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Under Friendly Societies' Acts, 194. *Friendly Society*, I.

BENEFIT SOCIETY.

See *Friendly Society*.

BILL OF LADING.

I. Negotiation.

1. What shews authority in consignee to indorse before acceptance for the amount.

B., a *Dantzick* merchant, sold wheat to *W.*, an *Amsterdam* merchant, to be paid for by drafts, to be drawn by *B.* on *C.* a *London* merchant, against bills of lading. *W.* was in fact, though that was not disclosed to

B., acting for *P.*, another London merchant. *W.* wrote to *C.* opening a credit, on account of *P.*, in favour of *B.*, to be drawn on against bills of lading, *P.* to be debited with the amount. *B.* forwarded a bill of lading, indorsed by him in blank, to *C.* in a letter stating that, "according to instructions from *W.*," we hand you bill of lading, "and request you to follow" his instructions respecting the document, "by whose order, and for whose account," we draw on you, "which drafts we recommend to your kind protection." On the day after *C.*'s receipt of this letter, the draft was left with *C.* for acceptance. *P.*, on the same day, being in actual possession of the bill of lading, pledged it with *G.*, who *bonâ fide* gave value for it. On the evening of the same day, *P.* was arrested on a criminal charge; and he afterwards became bankrupt. *C.* did not accept the draft; and, on the ensuing day, became bankrupt. *W.* also failed. *B.* stopped the cargo in transitu. *G.* brought trover against him for the cargo.

On a case stating the above facts, with power for the Court to draw inferences of fact;

Held, that *B.* *primâ facie* had the right to stop in transitu; and that *G.* though a *bonâ fide* transferee for value of the endorsed bill of lading from *P.*, was not entitled to the cargo, unless *P.* had, not merely possession of the bill of lading, but a right to transfer it; inasmuch as bills of lading are not negotiable to the same extent as bills of exchange.

But held: that *C.* was entitled to hand over the bill of lading to *P.*; the letter from *B.* not imposing any condition to prevent *C.* from doing so. And the Court, as an inference of fact, thought that *C.* had so handed it over to *P.*

Judgment for plaintiff. *Gurney v. Behrend*, 622.

2. Mere possession not sufficient so as to give title to a transferee, 622. *Ante*, 1.

II. Effect of Indorsement.

BILLS OF EXCHANGE

Indorsement on resale
ment of price, 283. *Ag*

III. Payment.

Effect of local custom as
703. *Custom*, 1.

BILLS OF EXCHANGE PROMISSORY NOTE

I. What is a bill or note.

Not where payee is uncertain
time of making.

Defendant signed, and plaintiff, a written instrument containing the following words: "months after date, I promise to the secretary for the time being of the Society, The Indian &c. Society, Company's rupees, twenty with interest at the rate of 5 per cent. I hereby deposit in his hands two Union Bank shares," "pledge or security for the payment of the said sum of 100 rupees, twenty thousand, as and, in default thereof, I authorize the said secretary, time being, forthwith, either by private or public sale, absolute or dispose of the said two Union Bank shares, so deposited with him; and out of the proceeds to reimburse himself the said sum of 100 rupees, twenty thousand, and interest thereon, as aforesaid, rendering to me any surplus may be forthcoming from the sale. And I hereby promise and undertake to make good whatever, if any, may be wanting over and above the proceeds of such sale, to make up the full amount of the said loan of 100 rupees, twenty thousand, and interest as aforesaid."

Plaintiff, at the time of the execution and delivering of this instrument, was then and thence forward continually, until the expiration of the nine months, had been secretary of the Society. An action was brought by him against the defendant after the expiration of the nine months, as upon a promise made by the defendant in the declaration averring that he had been and to be secretary of the Society.

aforesaid, and the defendant having denied making the note :

Held, that the instrument was not a promissory note, the payee being uncertain at the time of the making.

Quere, Whether, independently of this objection, the promise by the maker to pay in default of the deposit making up the sum would have prevented the instrument from being a promissory note? *Storn v. Stirling*, 832.

2. Inchoate instrument accepted, but without drawer or payee, 559. *Carrier*.

3. Effect of the promise to pay being only in default of deposit, 882. *Ante*, 1.

IX. Bonâ fide holder for value without notice.

How far affected by unauthorized alterations, 683. *Ante*, IV.

II. Drawers or makers : authority.

1. Directors of a company, for what purposes, 1. *Bank*, II. 1.

2. Excess that can be severed, when it does not vitiate, 1. *Bank*, II. 1.

3. How far to be done in the name of the firm, 1, 34. *Bank*, II. 1.

4. Ratification, 1, 45. *Bank*, II. 1.

III. Joint and several.

Whether a note may be joint only as to some parties and both joint and several as to others, 1. *Bank*, II. 1.

IV. Acceptance.

Unauthorized alteration in.

An unauthorized alteration of a general acceptance of a bill, by the addition of a place of payment, discharges the acceptor, even as against a bonâ fide holder, subsequently taking the bill for value and without notice of the alteration. *Burchfield v. Moore*, 683.

V. Alterations.

When they discharge, 683, *Ante*, IV.

VI. Interest.

Effect of its being made payable by coupons, 1. *Bank*, II. 1.

VII. Payment by.

Effect of part payment by, 136. *Limitation*, I.

VIII. Purchase or sale of bills.

Distinguished from borrowing on the security, 1, 44. *Bank*, II. 1.

IX. Miscellaneous points.

1. What is a borrowing or taking up money at interest on promissory notes or debentures, 1, 43. *Bank*, II. 1.

2. Value of inchoate bill accepted but without drawer's name, 549. *Carrier*.

BOARDING HOUSE.

Responsibility of housekeeper for care of guest's baggage, 144. *Bailment*, I.

BOARD OF HEALTH.

I. General Board.

Effect of their orders after confirmation by statute, 517. *Highway*, I. 1. 530. *Contract*, II.

II. Local Board.

1. Municipal corporation : interest in contracts, 530. *Contract*, II.

2. Functions as surveyors of highways, 517, 989. *Highway*, I. 1. IX. 1.

III. Repairs of highways.

1. Liability to contribute to repair of turnpike roads, 989. *Highway*, IX. 1.

2. Application of Highway rates, 989. *Highway*, IX. 1.

BOND.

I. Generally.

Effect of the presumption that parties contract only with a view to the then existing state of the law, 653. *Surety*.

II. In particular instances.

Surety bond : change in circumstances, 653. *Surety*.

BREACH.

By nonpayment of one instalment, 83.
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BURIAL.

Rate for providing additional burying ground.

Quare, Whether, under stats. 58 G. 3. c. 45., 59 G. 3. c. 134., a rate can be laid for the purpose of providing additional burying ground?

If it can, still a single rate, laid for purposes authorized by these Acts, and also for purposes for which a church-rate can be laid only at common law, is bad.

Therefore, where a rate was laid, with the formalities requisite for a rate under the statutes, "for and towards providing necessary additional burial ground" for a parish, "and for and toward spouting" a chapel, and the magistrates refused to issue a distress warrant for non-payment, this Court refused to order the magistrates to issue the warrant. *Regina v. Arney*, 779.

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CANDIDATE.

Ineligible.

Effect of voting for him, 249. *Election*, I. 1.

CANTEEN.

Rateability, 346. *Poor*, IV. 2.

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CAPTAIN.

See *Shipping*, IV.

CARE.

By boarding-house keeper, 144.
Bailment, I.

CARRIER.

Notice limiting liability & value.

Inchoate bill of exchange of no value.

C., being indebted to < than 10*l.*, framed a document to himself, ordering him months after date, to "pay order" the amount. The had the stamp proper for exchange of that amount of time, and was in all resp bill of exchange, except was no drawer's name. C it his acceptance, and caus forwarded in a parcel, direc by a common carrier, in ord might add his name as draw

On an action against the the loss of other goods, of than 10*l.*, contained in thesa the defence was that the p tained a bill, order, notice for payment of money, or value, exceeding 10*l.*, and notice had been given of the or increased rate of carria contracted for, though the c publicly exhibited in his notice requiring such incre for articles within stat. 11 W. 4. c. 68. s. 1. The j that the incomplete bill was time of delivery to the carr value.

Held: that it was not a l note, security for payment nor writing of any value, a of such delivery.

Quare, per *Erle J.*, whet jury had found the value in finding could or could not supported. *Stoessiger v. Soa Railway Company*, 549.

CERTAINTY.

Uncertainty as to payee, 8 I. 1.

CERTIFICATE.

I. Of justices.

1. Must shew the prelimina give jurisdiction.

Two justices made a certificate, under stat. 5 & 6 W. 4. c. 50., for the diversion of a highway. The certificate stated that the justices had on the application of the surveyor of the highways viewed the highway proposed to be diverted, &c., but did not shew that the surveyors were authorized to make the application. On appeal, by a party interested, the Sessions held the certificate bad on this ground, and refused to proceed further.

A rule Nisi having been obtained for a mandamus to enter continuances and hear the appeal:

Held: that the appellate jurisdiction, given to the Sessions by stat. 5 & 6 W. 4. c. 50., was not limited to the points mentioned in sect. 89, but was general; and that consequently the Sessions had jurisdiction to entertain the question whether the certificate was good or bad; but that, having exercised their jurisdiction, mandamus did not lie, even if they were wrong.

Held, also, that the certificate was defective, as not shewing that the preliminaries necessary to give the two justices jurisdiction to certify had been complied with. *Regina v. Worcestershire, Justices*, 477.

2. For diversion of highway, 477. *Ante*, 1.

II. Of barrister under Friendly Societies Acts, 194. *Friendly Society*, I.

CERTIORARI.

I. Generally.

Construction of clause taking away, 547. *Post*, III.

II. Removal of appointments.

Appointment of inspector of weights and measures when not removeable.

Under stat. 5 & 6 W. 4. c. 63., the Sessions have power to appoint inspectors of weights and measures; and, for such appointment, they may, if they think fit, select inspectors and superintendents of rural police (acting under stat. 2 & 3 Vict. c. 93.): and therefore such appointment cannot be removed by certiorari, sect. 36 of stat. 5 & 6 W. 4. c. 63. taking away the certiorari. *Regina v. Jarvis*, 640.

III. Indictments removeable.

For non repair of highway.

An indictment preferred at the assizes, for non repair of a highway, by order of justices under stat. 5 & 6 W. 4. c. 50. s. 95., is removeable by certiorari at the instance of the defendants. *Regina v. Sandon*, 547.

IV. Removal of indictment: costs.

1. Costs subsequent to trial, 960, 964. *Highway*, II. 1.

2. Costs of prosecutor by order of justices under highway act, 960. *Highway*, II. 1.

V. To remove orders of Sessions.

1. In order to take out execution as upon a judgment, 172. *Appeal*, IV. 1.

2. To remove orders of Sessions as to treasurer's accounts, 763. *County*, I.

VI. What documents to be included in return.

Direction of visiting justices, when not, 763. *County*, I.

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Judge at Chambers. *Judge*, II.

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See *Churchwarden*.

CHARGE.

I. On land.

1. Registered judgment, 737. *Judgment*, I. 1.

2. Priority of mortgage, or elegit on prior judgment, 737. *Judgment*, I. 1.

II. On stock, without notice to trustees, 748. *Judgment*, II.

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1. What is not, 219. *Devise*, II. 1.

2. Effect of on a devise, 219. *Devise*, II. 1.

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Removeability, 596. *Poor*, XI.

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CHURCH RATE.

Not to be combined with rate for providing additional burying ground, 779.
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CHURCHWARDEN.

I. Election.

Rejection of good votes when no ground for mandamus.

Where, upon the election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, this Court refused to grant a mandamus ordering a fresh election. Though the persons, whose votes had been rejected, were parties to the application. *Ex parte Mawby*, 718.

II. Of district chapel under church building acts.

When not competent to perform secular duties imposed by statute.

A rule was obtained calling on the overseers of a parish to shew cause why two justices should not issue their warrant, under sect. 38 of stat. 3 & 4 W. 4. c. 90. (The Parochial Lighting and Watching Act), to levy by distress on the goods of the overseers two sums of money ordered to be paid by the inspectors of a district within the parish, in which the provisions of that Act had been adopted. By the affidavits it appeared that the district was one assigned to a chapel for ecclesiastical purposes, under stat. 1 & 2 W. 4. c. 38.; and that the provisions of stat. 3 & 4 W. 4. c. 90. had been adopted, more than two years before

COMPANY.

the application, at a meet by the churchwardens of church. These churchwardens shewn affirmatively by the were churchwardens for purposes only, and never of calling meetings for purposes.

Held: that the meeting properly convened, the church of the district church not churchwardens as are c by stat. 3 & 4 W. 4. c. 90 consequently the provision had never been duly adopted district; and that the inspectors was void.

Rule discharged. *Reginwinford, Overseers*, 688.

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I. To examine witnesses in state, 114. *Witness*, I. 1.

II. Transactions through agent, 284. *Agent*, I.

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2. Indemnification clause, its effect on collateral contract by parol, 307. *Contract*, I. 1.

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2. Effect of the original subscriber substituting nominees, 307. *Contract*, I. 1.

IV. Provisional directors.

Liability of provisional directors to return deposit, 307. *Contract*, I. 1.

SECONDLY: Incorporated companies.

V. Shareholders: liability to creditors of company.

1. Execution against shareholder whose shares are not paid up.

Under sect. 36 of The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16.), a party who has recovered judgment against a company is not precluded from issuing execution against the shareholders who have not paid up for their shares, though lands of the company have been delivered on elegit, if the proceeds of the lands be insufficient to satisfy the debt.

Therefore, in such a case, a mandamus issued commanding the Company to give the creditor inspection of the register of shareholders. *Regina v. Derbyshire, &c., Railway*, 784.

2. Effect of previous elegit against company, 784. *Ante*, 1.

VI. Creditor.

His remedy against shareholders whose shares are not paid up, 784. *Ante*, V. 1.

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VII. Register of shareholders.

Mandamus for creditor to inspect, 784. *Ante*, V. 1.

THIRDLY. Joint stock not registered.

VIII. Liability of shareholders.

1. On promissory notes made for the purposes of the company: "jointly and severally," 1. *Bank*, II. 1.

2. Effect of irregularities, and of excess of authority, 1. *Bank*, II. 1.

3. When it is that a security is on the face of it sufficiently given for the company, 1. *Bank*, II. 1.

IX. Capital.

What purposes and powers imply that it may be raised by loan, 1. *Bank*, II. 1.

X. Shareholders: ratification.

By acquiescence in balance sheet, and receipt of dividends, 1, 45. *Bank*, II. 1.

XI. Directors.

1. Consequence of separable excess in the exercise of their powers, 1. *Bank*, II. 1.

2. Extent of their implied authority, 1, 38. *Bank*, II. 1.

COMPENSATION.

Under Lands Clauses Act.

I. Question for the jury.

They must assume the right to exist.

Notice was given by *D.* to a railway company that by their works they had permanently obstructed a way to the use of which *D.* was entitled as appurtenant to a messuage belonging to *D.*: whereby *D.* was prevented from enjoying the way, and his interest in the messuage was injuriously affected: and the Company were required, in default of their agreeing to pay to *D.* a sum named, to issue their warrant to the sheriff to summon a jury to assess compensation.

E. & H.

The Company issued a warrant, reciting the notice, stating that they did not admit *D.*'s right to the way, or the damage, or the injurious affection; but that they were willing that the amount of the said compensation should be settled as requested in the notice; and they required the sheriff to summon a jury to determine by their verdict the amount of the compensation in respect whereof *D.* by his notice had required the Company to issue their warrant.

The sheriff summoned a jury to try the question in dispute in the warrant. At the inquiry, the jury having been sworn to inquire and assess the compensation and damages in the warrant mentioned, evidence was given for and against the existence of the right. *D.* insisted that the existence of the right was to be taken for granted on the inquiry, and, further, that the right was proved. The Company insisted that the right was disproved, and that the jury ought to be told that *D.* was not entitled to any compensation.

The sheriff told the jury to say whether *D.* was entitled to the way; but, if they negatived this, to say what was the compensation to be paid on the assumption that the right existed.

The jury found that the right of way did not exist, and that on that ground *D.* had not sustained any damage: but, on the supposition that they were to assume its existence, they settled the compensation at 150*l.* This finding was specially incorporated in the verdict; and the sheriff gave judgment thereon that *D.* had not sustained any damage.

This Court, on the application of *D.*, quashed the inquisition, verdict and judgment, upon certiorari: holding:

1. That the jury, under sect. 68 of The Lands Clauses Consolidation Act, 1845, had no power to inquire into the right of *D.* to the way, but were bound to assess compensation upon the assumption that it existed.

2. That the verdict was totally bad, and could not be rejected as to the negating the right but stand as to

the conditional assessment of amount.

Per Lord *Campbell C. J.*, *Col and Wightman Js.*; dissentiente *J.*, who held that the jury had to inquire into the right. *Reg London and North Western R. Co.*, 443.

II. Verdict.

When totally bad, though the alternative is found condition. 443. *Ante*, I.

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For permanent obstruction of 443. *Ante*, I.

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1. So as to give cumulative relief. 172. *Appeal*, IV. 1.

2. Not strained to meet mischief. 544. *Contract*, II.

3. When not restricted by title preamble, 563. *Landlord and tenant*, II.

CONSTRUCTION.

4. So as to give independent effect to an independent provision, 563. *Landlord and Tenant*, II.
5. Proviso construed with reference to enactment, 596. *Poor*, XI.
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1. "All my other copyhold," 219. *Devise*, II. 1.
2. "Any," 563. *Landlord and Tenant*, II.
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5. "Clearly and explicitly stated," 724. *Action*, III. 1.
6. "Continue in the said office," 653, 675. *Surety*.
7. "Wherry, lighter, or other craft," 889. *Shipping*, I. 1.
8. "Enlarging, or otherwise extending," 779. *Burial*.
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10. "Give and bequeath," 572. *Devise*, I. 1.
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13. "New manufactures," 256. *Patent*, I. 1.
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15. "Rate made and levied," 390. *Highway*, IV. 1.
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17. "In which such action is pending," 977. *Patent*, II. 2.
18. "Not hereby otherwise particularly directed," 390. *Highway*, IV. 1.
19. "Remittances," 1, 46. *Bank*, II. 1.
20. "Road," 989, 1007. *Highway*, IX. 1.
21. "Scientific purposes exclusively," 793, 807. *Poor*, III. 2, 4.
22. "Security for the payment of money," 549. *Carrier*.
23. "Sickness," 587. *Poor*, XIII. 1.
24. "Street," 989, 1006. *Highway*, IX. 1.
25. "Secretary for the time being," 832. *Bills*, I. 1.
26. "Voluntary contributions," 416, 427, 793, 807. *Poor*, III.
27. "By words only," 136. *Limitation*.
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CONTRACT.

I. Generally.

1. Parol contract, in consideration of which, a party pays money and executes a deed directing its application.

The provisional directors of a projected railway company issued circulars, stating that they had made arrangements with the *S.* Company securing important advantages to the projected Company, which justified the

directors in asserting that their proprietors would be insured against loss, and in proceeding to Parliament, and adding, "in the event of the act not being obtained, the directors undertake to return the whole of the deposits without deduction."

This circular coming to plaintiff's knowledge, he applied, in writing for shares: the directors, in a written answer, inclosing the circular, stated that shares were allotted to him; that he must pay the deposit by a day named; and, on his doing so and presenting the letter, a receipt would be given him, which would be exchanged for scrip on his executing the Parliamentary contract and subscribers' agreement. He paid the deposit, got the receipt, executed the contract and agreement, and got the scrip.

The agreement was a deed, prepared before the issuing of the circular, in two parts: the subscribing shareholders of the first part, and two trustees of the second. The subscribers agreed with the trustees to form a company; and the ordinary powers, including those necessary for obtaining an act, were given to the provisional directors; and it was agreed that such directors should be indemnified in respect of all acts done in pursuance of their powers, and should, out of the funds of the company, reimburse themselves all expenses incident thereto: that the subscribers should make deposits; that the directors might apply the funds for the purpose of the undertaking as they should think expedient; that, whether the act should be obtained or not, the subscribing shareholders would indemnify the provisional directors all expenses incurred by them in executing their powers.

No act was obtained: and the S. Company made no payment. The directors expended part of the fund, raised by the deposits, in expenses bonâ fide incurred in attempting to obtain the Act.

On an action for money had and received, brought by plaintiff against a provisional director who was a party to the circular and subsequent proceedings: Held, that such action lay

for the whole deposit without deduction, on the undertaking to return for that the contract embodying the undertaking was: (1) not merged in the subscribers' deed, which was between other parties, and for other purposes; (2) not superseded by the deed, or controuled by the claim to indemnity therein; the execution of the deed being an act done in the performance of the original contract, and consideration of the directors undertaking to return the deposit.

Held, also, that the contract, made up of the written correspondence and the acts of the plaintiff, was not wholly in writing, and required no stamp.

Before action brought, plaintiff wrote to defendant, stating the interest claimed from a time not specified, which was earlier than the date of demand, and not stating to what he claimed it: held a sufficient compliance with stat. 3 & 4 W. 4. s. 28., so as to entitle the jury to find interest from the date of the demand to the time of payment of the principal.

After the scrip was obtained above, the secretary of the company explained to plaintiff, that the result of the directors issuing the circular was that they had a guarantee from the S. Company against all expenses, and he afterwards wrote to plaintiff inclosing the circular, and stating the guarantee of the directors for the return of deposits was made in pursuance of one they had received from the S. Company. Plaintiff then agreed to take more shares, and received a letter of allotment as before: but to some of these last, he named certain persons to whom the shares were allotted, as his nominees and for whom the scrip was obtained by plaintiff, and the scrip was obtained by plaintiff for the whole, he paying all the deposits, but his nominees only executing the contract and agreement, in respect of the shares in their names. It was held that plaintiff was entitled to recover the deposits as to this scrip also; being no distinction between the different contracts as to any of the material points. *Mowatt v. Lord Londonderry*, 307.

2. Partly oral and partly written, 307. *Ante*, 1.
3. Estoppel by, 363. *Friendly Society*, IV. 1.
4. What is an interest in: sale to contractor, 530. *Post*, II.
5. What is a security for the payment of money only, 530. *Post*, II.
6. Effect of the consideration that parties contract only with a view to the then existing state of the law, 653. *Surety*.
7. Whether an instrument can be both a promissory note and an agreement of another kind, 832. *Bills*, I. 1.
8. When not vitiated by excess, 1. *Bank*, II. 1.
9. Effect of extrinsic incidents as to the writing, printing, or form used, 48, 82. *Insurance*, VI. 1.
10. When it may be by parol though the subject matter is founded on a deed, 83. *Accord*, I.

II. Disqualifying or prohibited as regards holders of office.

Subcontract by alderman with contractor with corporation, when not a disqualification.

By a provisional order of the General Board of Health, confirmed by statute, The Public Health Act, 1848, was applied to a district wholly comprised within a single municipal borough, and the corporation were constituted, by the council, The Local Board of Health. *L.*, an alderman of the borough, after such confirmation, sold some iron to a party who had contracted to supply the local board with iron railings, and who purchased the iron for the purpose of performing his contract. *L.* afterwards, continuing to be an alderman, was elected mayor, and acted as such. An action was then brought against him for penalties, under sects. 28, 53, of stat. 5 & 6 W. 4. c. 76., for having acted as mayor while disqualified by being

interested in a contract with the council.

Held: assuming a contract with such local board to be a contract with the council, within stat. 5 & 6 W. 4. c. 76. s. 28., and assuming also that a mayor, elected when alderman, is disqualified to act as mayor, under sect. 53, by reason of a disqualification as alderman:

That, nevertheless, this was not an interest in a contract within sect. 28, and there was no liability to penalty.

L. had contracted to construct some waterworks for commissioners for supplying the town with water. This contract not having been fully carried out, he gave it up, by deed, to the commissioners, they agreeing to pay him a certain balance if they abandoned the works, or completed them and obtained a specified quantity of water. The deed contained releases on each side, and covenants by *L.* not to molest the commissioners, that he had not injured the title, and for further assurances. The local board were afterwards constituted the commissioners. The works remained incomplete, but not abandoned, while *L.* was alderman, and also while he was mayor.

Held: on the same assumptions as before, that *L.* was not liable to a penalty: for that this contract was taken out of the operation of sect. 28 of stat. 5 & 6 W. 4. c. 76., as being a "security for the payment of money only," within stat. 5 & 6 Vict. c. 104. s. 1. *Le Feuvre v. Lankester*, 530.

III. Parties.

1. Shareholders through their directors: irregularities: excess, 1. *Bank*, II. 1.
2. Party suing upon a written contract not signed by him, 48. *Insurance*, VI. 1.
3. Provisional director, 307. *Ante*, I. 1.
4. Designatio personæ, 832. *Bills*, I. 1.

IV. Change in the terms.

- I. Unauthorized contract by agent to pay higher wages during part of term.

Plaintiff a sailor, signed articles for a voyage out to *M* and home at *M* per month. On the arrival of the ship at *M* several of the crew deserted. The captain, to induce the rest to remain, signed fresh articles with plaintiff and others at the rate of *M* per month for the home voyage. Plaintiff continued in the vessel till her arrival home, and then sued the shipowner for work and labour. Defendant paid money into Court at the rate of *M* per month. Plaintiff claimed to be paid at the rate of *M* for the home voyage. On the trial, there was some evidence that at *M* the captain had consented to the discharge of some of the crew. The Judge asked the jury if the plaintiff himself had been discharged before entering into the fresh articles. On their answering that he had not, the Judge directed a nonsuit.

Held, on a motion for a rule for a new trial, that the nonsuit was right: for that there was no evidence of any circumstances to free the plaintiff from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorize the captain to bind the owners by such a contract. *Harris v. Carter*, 559.

2. Consideration, 559. *Ante*, 1.

V. Effect of deed subsequent to parol contract.

When it neither merges, supersedes nor controls, 307. *Ante*, I. 1.

VI. Consideration.

1. Parol consideration for executing deed, 307. *Ante*, I. 1.
2. Mere completion of existing contract, no consideration for new promise, 559. *Ante*, IV. 1.
3. Illegal: price of land conveyed for illegal purpose, 642. *Covenant*.

4. Distinction between consideration and time which not good, 642, 650. *C*.

VII. Signature.

Place and manner, 48. *7* service, VI. 1.

VIII. Implied warranties.

1. Description of premises against fire, 368. *Insurance*

2. When continuous, 368. *X*

IX. Description.

How far a warranty, 368. *X*

X. Stamp.

When the contract is not in writing, 307. *Ante*, I. 1

XI. Action of contract.

Amendment of misjoinder suits, 396. *Amendment*

XII. How far affected by custom.

Local custom as to discount under bills of lading, 700. *I*

XIII. In particular instances:

1. Purchase or loan on *Bank*, II. 1.
2. Reinsurance on a life, *renew*, VI. 1.
3. Contract to return on failure of scheme, 307.
4. Between shipowner and 559. *Action*, I. 1. *IV*.
5. Contracts with municipality as local board of *Ante*, II.
6. Between captain and *Ante*, IV. 1.
7. Between shipper and to negotiation of bill of *Bill of Lading*, I. 1.

CONTRIBUTION.

CONTRIBUTION.

By parish to repair of turnpike road,
599. *Highway*, VIII. 1.

CONVEYANCE.

Of land.

For an illegal object, 642. *Covenant*.

CONVICTION.

I. Conviction and warrant of committal.

When they may be either in the same
or in separate instruments.

The return to a habeas corpus ad subjiciendum, to bring up *B.*, assigned, as the cause of *B.*'s detention, a warrant by a justice, which recited, in the past tense, that "*B.* was" this day "convicted before me" of an offence against stat. 4 *G.* 4. c. 34., "and I, the same justice, adjudged" that *B.* should be committed for two months with hard labour; and the warrant then, in the present tense, commanded the constables to take and the gaoler to receive *B.* The warrant did not set forth the evidence, nor state that it was taken in the prisoner's presence, or on oath.

Held that, under stat. 4 *G.* 4. c. 34., the conviction and warrant might be in one instrument, but might also be separate; that the instrument in the present case was not a conviction, but a warrant founded on a previous conviction; and was therefore good in form.

Affidavits were used shewing the evidence before the justice.

Held: that it was open to the prisoner to shew, by affidavit, that there was no evidence from which the justice might reasonably draw an inference that the relation of master and servant existed between prisoner and his employer, as that would shew that the justice had no jurisdiction.

In the present case the affidavits shewed only that there was evidence both ways: and the prisoner was remanded. *Bailey's Case*, 607.

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II. Jurisdiction how negatived on rule for habeas corpus, 607. *Ante*, I.

CORONER.

Election: qualification of voters.

Equitable interest not sufficient.

By a local statute, land was vested in trustees in fee, in trust for the benefit of the inhabitants of the parish of *H.*, subject to by-laws which the trustees were empowered to make. The trustees were empowered to let the land; and to regulate the right of pasture, on the portion not let, to be enjoyed by the inhabitants of the parish of *H.*, householders at the time of the passing of the Act. The right of pasture of each such householder at the time of the Act was assignable to any others being inhabitants.

At an election for coroner for a district comprehending the parish of *H.* and the land in question, the votes of inhabitants of the parish entitled, as assignees, to pasture over the land in question were received for the candidate who was returned.

On a quo warranto against him,

Held: that the qualification for a voter for coroner is the possession of a legal freehold: that these inhabitants had, at most, only an equitable interest in the land; and that their legal interest was, at most, a right to common in gross, which confers no vote. Judgment for the Crown. *Regina v. Day*, 859.

CORPORATION.

I. By-laws.

1. Presumption from usage.

By the governing charter of a corporation, the Community were annually to elect four wardens from the men of the Community.

In fact, for about four hundred years, the election had been made by a court of assistants, who were elected, by the court itself, from the body of the Community. The wardens had always been elected from members of

the Community, and generally, but not uniformly, from those who were members of the court of assistants.

Held: 1. That a by-law establishing such a mode of election would be good.

2. That the passing of such a by-law in fact might be presumed from the usage. *Regina v. Powell*, 377.

2. Validity of by-law controlling mode of election, 377. *Ante*, I.

II. Election of officers.

Restrictions by long usage, 377. *Ante*, I. 1.

III. Municipal. *Municipal Corporation*.

COSTS.

I. Security for costs.

When required from plaintiff in error being also plaintiff below.

A plaintiff in the Queen's Bench, after judgment there for defendant, suggested error in the Exchequer Chamber, which defendant denied. Plaintiff resided abroad out of the jurisdiction of the *English* Courts. He had, by order of the Queen's Bench, given security below for costs: and the costs incurred in that Court exceeded the amount for which security had been given.

On the application of the defendant, after denial of error, the Court of Exchequer Chamber ordered the plaintiff to give security for costs in error to the satisfaction of the master of the Court below, proceedings to be stayed in the meanwhile. *Bougleux v. Swayne*, 829.

II. Of witnesses.

1. Party witness in his own cause: not entitled as a general rule.

Plaintiff obtained a verdict. Defendant obtained a rule Nisi for a new trial, which was discharged. Plaintiff was a witness in his own cause; and he remained in this country till after the rule Nisi was discharged. On taxation the Master allowed the plaintiff subsistence money from the time

the rule was granted till it was discharged. On a rule to review taxation.

Held: that, as the Master must be taken to have found that plaintiff was a necessary witness, that he could not have attended a second trial, if so were ordered, unless he remained, and that his remaining incapacitated him from earning his subsistence, the detention might, under those special circumstances, be considered as part of the costs of the rule; and the allowance was right.

It is not a general rule that parties if witnesses, are to have an allowance for their attendance. *Dowdell v. Australian Royal Mail Company*, 902.

2. Under what circumstances party witness in his own cause is entitled 902. *Ante*, I.

3. Witness remaining in attendance pending rule, 902. *Ante*, I.

III. On rules, generally.

Where court equally divided.

Where a rule for a new trial drops on account of the Court being equally divided in opinion, no costs of the rule are to be allowed to either party. *Dansey v. Richardson*, 722.

IV. On rule for new trial.

Party witness remaining in attendance pending the rule, 902. *Ante*, II.

V. Side bar rule for taxation.

Where order does not specify amount 960. *Highway*, IV. 1.

VI. Party liable.

Successors in office, 390. *Highway*, IV. 1.

VII. In quo warranto.

On disclaimer, 143. *Disclaimer*.

VIII. In error.

Security when required from plaintiff in error being also plaintiff below 829. *Ante*, I.

COUNCILLOR.

IX. Of appeal at sessions. *Appeal, IV.*

X. After certiorari.

1. Prosecutor's right after his own certiorari, 960. *Highway, IV. 2.*
2. Of highway prosecution, 390. *Highway, IV. 1.*

XI. Orders for.

When not bad through not stating amount, 960. *Highway, IV. 2.*

XII. Mode of enforcing.

By mandamus, 390. *Highway, IV. 1.*

COUNCILLOR.

See *Municipal Corporation.*

COUNTY.

I. Expences to be allowed as county expences.

Refreshments to persons engaged on public business at the Court House when not allowed.

The justices of the county of *L.* made rules for regulating the payment of expences attending the gaol, by which the gaoler's expences were to be certified by two visiting justices and then paid by the county treasurer. It was the custom to allow refreshments at the Sessions, and other meetings on county business, held at the Court House in the gaol, and to charge them as part of the expences of the gaol. A public inquiry, not connected with county business, was held at the Court House. Refreshments were furnished to those who attended, including some of the magistrates and their friends who took no part in the inquiry; the two visiting justices directed them to be paid for by the treasurer; which was done. At the ensuing annual Sessions in *September*, this payment was disallowed in the treasurer's accounts; and the accounts, so altered, were transmitted to the Home Office, under stat. 15 & 16 *Vict. c. 81. s. 50.*

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Subsequently, at an adjourned annual Sessions in the ensuing year, this disallowance was rescinded, and the payment allowed. There was a standing order at Sessions that notice should be given before any motion was made for altering or rescinding any resolution of the Court; but no notice had been given on this occasion.

The orders of Sessions having been brought up by certiorari, and a rule granted to quash so much as allowed this payment:

Held: that the Sessions had no power to allow a sum already disallowed at a former Sessions: that the payment of the expences of what was not connected with county business was illegal; and that the former Sessions were bound to disallow it: and that the direction of the visiting justices was not a judicial order which the treasurer was bound to obey. And the rule was made absolute to quash so much of the order as was complained of.

Held, also, that it was not necessary to include the direction of the visiting justices in the return to the certiorari. *Regina v. Saunders, 763.*

II. Treasurer's accounts.

Alteration of disallowance when bad, 763. *Ante, I.*

III. Visiting justices.

1. Their direction to defray expences when illegal, 763. *Ante, I.*
2. Their directions not judicial, 763. *Ante, I.*

COUNTY COURT.

I. When title comes in question.

1. How far the restriction applies to actions to recover land.

A summons was taken out in the county court by *A.* against *B.*, to recover lands under stat. 9 & 10 *Vict. c. 95. s. 122.*

On application for a prohibition by *B.*, it appeared that *B.* held, as a tenant to *C.* in his lifetime, two farms, *C.* being leaseholder of the one, and

tenant in fee of the other. *C.* died; and *A.* produced a will by which he was devisee of all *C.*'s real estate, and appointed executor. *A.* proved the will, and gave *B.* notice to quit. *B.* bonâ fide disputed the validity of the will.

Held: that the restriction contained in sect. 58, as to the jurisdiction of the county court when title to corporeal hereditament comes in question, applies to proceedings under sect. 122. That title to the leasehold could not here come in question, inasmuch as the probate was conclusive that the title to that was in *A.* But that title to the freehold did come in question. And the prohibition went as to the freehold farm, and was refused as to the leasehold. *Kerkin v. Kerkin*, 399.

2. Course of proceeding when it comes in question only as to part, 399. *Ante*, 1.

3. In what state of the title it cannot come in question, 399. *Ante*, 1.

4. Prohibition after seizure under execution.

After execution has been awarded in the county court, and defendant's goods have been taken, but not sold, prohibition will go to restrain the Court from proceeding further, if it appear upon affidavit, though not on the face of the proceedings in the county court, that title to corporeal hereditaments came in question in the cause, so that the judge had no jurisdiction under stat. 9 & 10 Vict. c. 95. s. 58. *Marsden v. Wardle*, 695.

II. Judge's order for a prohibition.

Time for applying to set aside.

The rule that an application to set aside a judge's order cannot be made after the end of the term next following the making of the order applies to an order made by a judge at chambers, prohibiting a County court from proceeding, under stats. 9 & 10 Vict. c. 95. s. 58., and 13 & 14 Vict. c. 61. s. 22. *Jordan v. Wilcoxon*, 193.

III. Building in which the business is transacted.

Non-rateability, 336. *Poor*, IV. 1.

CRIMINAL LAW.

IV. Prohibition.

1. As to part only, 399. *Ante*, 1.

2. At how late a stage, 695. *Ante*, I. 4.

COUPON.

Interest made payable by, 1, 37. *B* II. 1.

COVENANT.

Illegal consideration.

Covenant to pay the price of land conveyed for an illegal purpose

Action on a covenant to pay money. Plea, which the Court construed meaning that there had been an illegal agreement that, for a price to be paid to the plaintiff, land should be sold and conveyed to defendant for an illegal object; that the land was conveyed to defendant for that object and that afterwards the deed was executed to secure payment of the price.

Held by the Exchequer Chamber reversing the judgment of the Queen Bench, that the plea was good. For the deed being given as a security for the payment of a debt tainted with illegality, the law, which would not enforce the payment of the debt, would not enforce the payment of the security. *Fisher v. Bridges*, 642.

CREDITOR.

I. Priority.

1. Registration of judgments, 7 *Judgment*, I. 1.

2. Having a charge on stock of which no notice to trustees, 743. *Judgment*, II.

II. Remedy against shareholders of railway company, 784. *Comp* V. 1.

CRIMINAL LAW.

I. Proceeding criminal in form to a civil right.

CUSTOM.

1. New trial granted after miscarriage leading to an acquittal, 942. *New Trial*, I. 1.
 2. Whether indictment for obstructing a navigation is such a proceeding, 942. *New Trial*, I. 1.
- II. Certiorari. *Certiorari*.
- III. Indictment. *Indictment*.

CUSTOM.

- I. Mercantile custom controuling written contract.

Local custom as to discount from freights under bills of lading.

A bill of lading expressed that goods, shipped at *N.*, were deliverable at *L.*, to order or assigns, "he or they paying freight for the said goods five eighths of a penny sterling per pound, with five per cent. primage, and average accustomed." By the usual custom, in the trade at *L.*, three months' interest or discount is deducted from freights, payable under bills of lading, on goods coming from certain ports, including *N.* The assignee of this bill of lading having received the goods, the shipowner claimed the freight without any deduction, contending that the custom was not binding in law as contradicting the written contract. The assignee paid the freight, less the discount. On a case stating the above facts,

Held, that the custom was binding, and controuled the bill of lading. *Brown v. Byrne*, 703.

- II. See also 48, 78. *Insurance*, II. 1.

DAMAGE.

- I. Generally.

Personal, distinguished from injury to estate, 274. *Action*, II. 1.

- II. As essential to action.

By ca. sa. for too large a sum, 929. *Arrest*, I. 1.

- III. Measure.

DEBT.

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In action against attorney for negligence in taking a security, 743. *Judgment*, II.

DEBENTURE.

Page 1. *Bank*, II. 1.

DEBT.

Assignment.

Effect of assignment and reassignment according to law of *California*.

To an action for money payable by defendant to plaintiff, defendant pleaded that *C.*, a joint debtor with defendant, resided beyond the seas in *California*, a State forming part of the *United States of America*, within the jurisdiction of a court of that State. That, by the law of *California*, a creditor might voluntarily assign his debt to another person, who might in his own name sue the debtor. That plaintiff, being in *California*, assigned the debt to *R.* there, and *R.*, in his own name, sued the defendant and *C.* for that and other debts in a Court there having jurisdiction for the recovery of such assigned debts, and recovered judgment for the debts; and defendant and *C.* were liable to be sued by *R.* in this country upon the judgment. That the judgment was for an entire sum, making no distinction between the debts, and was partly satisfied by the levy of a sum less than the amount of the judgment, and not applicable to any of the debts recovered more than to any other.

Replication. That the law of *California* was, that the assignee might reassign to the creditor the debt, or so much thereof as was unsatisfied, and the creditor might sue in his own name for so much, as if no such assignment had been made, notwithstanding the creditor in the meantime had recovered judgment, unless the whole was actually levied. That *R.*, before he had received any part of the debt, or before any sum applicable thereto had been levied, reassigned to plaintiff; by reason whereof plaintiff became entitled to sue for the debt in his own name, as if there had been no

such assignment as mentioned in the plea.

Held: that, assuming the plea to shew that the assignment, made in *California*, by the law of that country transferred the exclusive right to sue (in which case, *semble*, the plea was good), it was answered by the replication. *Thompson v. Bell*, 236.

DEBTOR.

I. Generally.

Effect of judgments, 737, 743. *Judgment*, I. II.

II. Insolvent: assignee.

1. What causes of action vest in, 274. *Action*, II. 1.
2. Interference of assignee in action brought by insolvent, 274. *Action*, II. 1.
3. To what actions the stat. 15 & 16 *Vict. c. 76. s. 142.* is applicable, 274. *Action*, II. 1.

DECLARATION.

I. Indebitatus counts.

Omission of the introductory words stating the money to be payable, 650. *Account Stated*, I.

II. In particular instances.

1. By seaman against shipowner for injuries from unseaworthiness and non-provision of medicines, 402. *Action*, I. 1.
2. For malicious arrest for whole amount after part satisfaction, 929. *Arrest*, I. 1.
3. By assured, on policy of insurance, 48. *Insurance*, VI. 1.

DEED.

I. Privilege of not producing title deeds.

1. Compelling production for identification.

Defendant, at the trial, called on a person, served with a subpoena duces

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tecum, to produce a deed; he declined on the ground that he held the deed as attorney for a mortgagee, and that his client had directed him not to produce the deed, which was one of his deeds; and the judge allowed the privilege. Defendant did not call the client as a witness, but proceeded to offer secondary evidence of the contents of the deed. The judge received the evidence. In the course of the evidence, it became necessary to shew the identity of the instrument, which the attorney refused to produce, whereupon the witnesses called to produce its contents, had seen. For this purpose the judge compelled the attorney to shew the indorsement on the back of the deed; the attorney and also the plaintiff objecting. Defendant had a verdict. On a motion for a new trial.

Held, that a sufficient foundation had been laid for the reception of secondary evidence without calling the client himself, on the speculation that he might waive his privilege.

Held, also, that the judge did right in compelling the production of the deed for identification in the manner mentioned, as that did not involve a disclosure of its contents.

Semble, that if he had violated the privilege of the mortgagee, it would have been no ground for a new trial at the instance of the party to the cause. *Phelps v. Prew*, 430.

2. Admission of secondary evidence after refusal by attorney to produce his client's deed, 430. *Ante*, 1.

3. Consequence of violation of privilege, 430. *Ante*, 1.

II. Recitals.

In a deed poll: effect as an estoppel, 48. *Insurance*, VI. 1.

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1. When merely inducement, 83. *Contract*, I.
2. When it does not merge, supersede or controul a parol contract, in consideration of which it was executed, 307. *Contract*, I. 1.

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IV. In particular instances.

1. Subscriber's agreement, 307. *Contract*, I. 1.
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When it amounts to a warranty, 868.
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See *Shipping*, V.

DEVISE.

I. Words that pass subsequently acquired land.

1. "Estate," coupled with words of personalty.

O. being then possessed of personalty only, by will executed in 1849, after bequests of money and chattels, added: "all the rest, residue and remainder of my goods, chattels, stock in trade, estate and effects of what nature or kind soever, not hereinbefore given or bequeathed, I give and bequeath unto" *B.* and *T.*, executors of the will, "to hold to them, the said *B.* and *T.*, their executors, administrators, and assigns," upon trust to "sell and dispose thereof," and call in and receive all debts,

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"and place the moneys arising by such sale or disposal" upon Government or other security, receive the interest and dividends, and pay the same to testator's wife for life during her widowhood; and, if she died or married again, to apply the same, or a sufficient part thereof, to the maintenance of his children till they should come of age; and when the youngest should come of age, to divide the said residue and the interest equally among the children.

After the execution of the will, *O.* purchased land.

Held that, under stat. 7 W. 4 & 1 Vict. c. 26, ss. 3, 24, such land passed by the residuary clause. *O'Toole v. Browne*, 572.

2. Limitation to executors, 572. *Ante*, 1.
3. Use of words of bequest, 572. *Ante*, 1.
4. Gift to executors, without beneficial interest, 572. *Ante*, 1.

II. Estate for life or in fee.

1. Effect of the words "estate" and "hereditaments."

Devisor, being seized in fee of copyhold lands including *The Mill Field*, by will made before 1st January, 1838, devised certain parcels of freehold land to *S.*, in fee chargeable with an annuity of 60*l.* to his wife for life, the first payment thereof to be made within three months of the devisor's decease. "Also I give and devise all that my copyhold estate called *The Mill Field*, consisting of seven messuages," &c., "situate at," &c., "unto my niece *Sally*," "for and during the term of her natural life, charged and chargeable, nevertheless, and I hereby charge the said copyhold estate so given to my said niece *Sally*, to and with the payment of one annuity or clear yearly sum of 25*l.* unto my brother" *E. S.* for life, payable half yearly, the first payment to begin within three calendar months next after devisor's decease; "and from and immediately after the decease of my said niece *Sally*, I give and devise the same copyhold heredita-

ments unto and equally between all and every, the children of my said niece, share and share alike." "Also I give and devise" freehold land described, "also all and every my other copyhold messuages or tenements, lands, tenements, and hereditaments," "wheresoever situate, unto my niece Ann, her heirs and assigns, charged and chargeable, nevertheless, and I hereby charge the same, to and with the payment of one annuity or clear yearly sum of 20*l.* unto my said wife (in addition to the annuity of 60*l.*," "for and during the term of her natural life, to be payable half yearly, and the first payment thereof to begin and be made within three calendar months after my decease." There was also a devise of "all and every other my real estates, not hereinbefore otherwise disposed of," to *V.* in fee.

Held that the devise to the children of *Sally*, passed only a remainder for life.

That the devise to *Ann* passed, not the reversion in *The Mill Field*, but the other copyholds undisposed of.

And that, therefore, the ultimate remainder in fee in *The Mill Field* passed to *V.* *Vick v. Sueter*, 219.

2. Effect of charging annuities, 219. *Ante*, 1.

III. Estate for life or in tail.

What does not show a general intention to enlarge.

K. being seized in fee, devised (by will made before 1838) to her nephew *A.*, to hold to him for his life without impeachment of waste; and from and after his decease, to "the first son of the body of" *A.*, "to hold the same to such first son for and during the term of his natural life only, without impeachment of waste. And from and after the decease of the last mentioned first son of the said" *A.*, "I give and devise all the said estates to the first son of the body of such last mentioned son, with remainder to the second, third and all other sons of the body of such last mentioned son for ever, the elder being always preferred to the younger. And in default of all such

issue as aforesaid, then I will that the said estates shall go and descend to my own right heirs for ever."

At the time of the making of will, *A.* had two sons and two daughters. *B.*, the elder of these sons, lived *K.*, but had no children after *K.*'s death; after which he both sons and daughters.

Held that *B.* took only an estate for life, and could not therefore, by an entailing deed, convey an estate more than his own life.

That *B.*'s sons took successive estates tail in remainder, by purchase and that, they having died with issue, or disentailing, the land went to the right heirs of *K.* *Kershaw v. Ishaw*, 845.

IV. Estate pur autre vie.

Special occupancy.

M., being seized in fee, devised her daughter *E.*, to hold to *E.*, "heirs, executors, administrators, assigns, for and during the natural lives of" *E.*, *E.*'s husband, and their daughter, and of the survivor; and in case the three "should all depart this life before the expiration of the one year, to be computed from the day of my decease, then to hold unto the executors, administrators and assigns" of *E.*, "for and during the said term of thirty one years be computed from the day of my decease." "And I do hereby give, devise and bequeath the reversion of aforesaid messuages" &c. "to grandson" *W. O. S.*, second son of *J. T. S.*, "and to the heirs male of the said" *W. O. S.*, remainder to third, fourth &c. sons of *J. T. S.* successively in tail male, and, in default of such issue, to the eldest son of *J. T. S.* in fee.

Held that, *E.* having died before other two lives expired, her heir took the land, as special occupant. *Crompton v. Dunsmure*, 918.

V. Subject matter.

"All and every my other copyhold in fee, after devising a specific copyhold for life, 219. *Ante*, II. 1.

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VI. Legal estate.

When, until exercise of power of sale, it vests in party to whom the beneficial interest is given, 823. *Poor*, IX.

VII. Power of sale.

In what person the legal estate vests, 823. *Poor*, IX.

VIII. Surplusage.

Effect of adding superfluous words of limitation, 918. *Ante*, IV.

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Of visiting justices, 763. *County*, I.

DIRECTOR.

See *Company*, XI.

DISCLAIMER.

On wrongful election : relator's costs.

Where a person wrongfully elected to a corporate office has accepted it, so that the office is full, the Court will not, in making a rule absolute by his consent for a quo warranto, make it one of the terms that the relator should bear the expences of the information and disclaimer, though the person in possession of the office does not defend it, and offers to undertake to disclaim if required. *Regina v. Hartley*, 143.

DISCOUNT.

Effect of local custom, 703. *Custom*, I.

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Novelty of invention, 256. *Patent*, I. 1.

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Disqualifying interest in contracts, 530. *Contract*, II.

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Penalties and costs recoverable by.

Not costs of highway prosecution, 390. *Highway*, IV. 1.

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I. Of district church, 688. *Churchwarden*, II.

II. For lighting and watching, 688. *Churchwarden*, II.

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Of highway, 477. *Certificate*, I. 1.

DIVIDEND.

Ratification by receipt of, 1, 45. *Bank*, II. 1.

DRAINAGE.

Right of tenant to protection against ill constructed drains on parts of the same property not let to him.

If the owner of land, on which is a house, construct on the other part of the land a sewer, and let the house, and afterwards, by reason of the original faulty construction of the sewer, and the continued user of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed. *Alston v. Grant*, 128.

DUTY.

I. Arising from grant of adjacent tenement, 128. *Drainage*.

II. Action for private injury sustained through breach of public duty, 402. *Action*, I. 1.

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I. Parochiality of districts.

Effect of modern usage as evidence, 906. *Poor*, I. 1.

II. Districts for ecclesiastical purposes only, 688. *Churchwarden*, II.

ELECTION.

I. Voting.

1. Throwing away votes on ineligible candidate.

Information in the nature of quo warranto for the office of mayor of a borough. Issue whether defendant was duly elected. Special verdict, in substance as follows: At an election for councillor for the borough, in November 1851, *B.* and *C.* were candidates. *B.* at the time was disqualified, being an alderman, which fact was known to the voters. *B.* had a majority of votes, and was returned, accepted the office and acted. *C.* obtained a rule for an information in the nature of a quo warranto, which was made absolute in Easter term 1852. The information was filed. *B.* disclaimed; and judgment of ouster was signed on 3d July 1852. On 26th October 1852, *C.* gave notice to the town council requiring them to admit him, on the ground that the votes for *B.* had been thrown away. On 8th November 1852, *C.* accepted the office and signed the declaration required by the statute: of all which the town council had notice. On the 9th November an election was held for the office of mayor: the defendant and *M.* were candidates. *C.* tendered his vote for *M.* It was rejected; and, the other votes being even, defendant was elected by the casting vote of the presiding officer.

Held, that the votes given for *B.* were thrown away: and that *C.* was councillor; that, the usurpation of the office by *B.* having rendered it impossible to accept the office within five days after notice of his election, he was excused from doing so; and that when *B.* was ousted *C.* ought to have been admitted.

Held also, that, supposing *C.* had been bound to accept within five days after notice, the special verdict did not shew that *C.* had notice of his election, inasmuch as it only disclosed evidence of that fact.

Held therefore, on both grounds, that it appeared on the special verdict

C.'s vote at the election of may improperly rejected.

Judgment for the Crown. *v. Coaks*, 249.

2. Rejection of good votes, w ground for mandamus, 718. *C warden*, I.

II. Effect of ouster.

New election when not necessary an ouster by quo warranto, *Ante*, I. 1.

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1. Coroner, 859. *Coroner*.
2. Officers of a corporation, 377. *poration*, I. 1.
3. Churchwarden, 718. *Church den*, I.

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ENTAIL.

Disentailing, 845. *Devise*, III.

EQUITY.

Equitable assignment of trust fund, *Judgment*, II.

ERROR.

I. Removal of judgment roll.

Error having been brought in liament upon a judgment of the chequer Chamber on a record of Court, this Court, under sect. 14 The Common Law Procedure 1852, ordered the Masters to take record itself to the clerk of the dicial department of the House Lords, and leave it with him, ta a receipt, and an undertaking for return of the same when the should be decided. *Lane v. Ho* 731.

II. Security for costs, 829. *Costs*,

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1. Effect of the word in a will, 219, 572. *Devise*, I. 1. II. 1.
 2. What passes under a devise, 219. *Devise*, II. 1.
 3. For life, 845. *Devise*, III.
 4. Estate tail, 845. *Devise*, III.
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1. Recital in policy of reinsurance as to the health of the person whose life is insured, 48. *Insurance*, VI. 1.
 2. Recital in deed poll, whether an estoppel against the grantee, 48. *Insurance*, VI. 1.
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1. By grantee of deed poll acting on the recitals therein, 48. *Insurance*, VI. 1.
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- Effect of its being improperly obtained, 430. *Deed*, I. 1.
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As a qualification to vote at election of coroner, 59. *Coroner*.

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FRIENDLY SOCIETY.

I. Amendment of rules.

FRIENDLY SOCIETY.

When valid, though some of the proceedings are irregular.

Where an amendment of the rules of a Friendly Society has received the barrister's certificate, under s. 4 & 5 W. 4. c. 40. s. 4., such amendment is valid, though there has been no resolution of the Society in compliance with the enactments of s. 10 G. 4. c. 56. s. 9., or with the rules of the Society incorporating that section. Per Lord Campbell C. J., *Coleridge and Wightman Js.*: dissentiente Erle.

The rules of a Society directed that three trustees should be appointed, of whom one should be treasurer, whose names the funds of the Society should be invested: and that the treasurer should invest the unappropriated stock exceeding 50*l.* as the board of management should direct, pursuant to stat. 13 & 14 Vict. c. 11. Three trustees were elected; but a fourth person was elected treasurer. Held that the three trustees could not sue a former treasurer for the balance in his hands, under these rules: as that they had no title to do so under stat. 10 G. 4. c. 56. or stat. 13 & 14 Vict. c. 115., which were prior to the rules taking effect. *Dewhurst v. Clarkson*, 194.

II. Barrister's certificate.

Effect in giving validity to rules, 194. *Ante*, I.

III. Right to sue.

When trustees have no right to sue, 194. *Ante*, I.

IV. Arbitration.

1. What conduct of member entitles him from disputing validity of appointment.

The rules of a benefit society established, enrolled and certified under stats. 10 G. 4. c. 56., 4 & 5 W. 4. c. 40. and 9 & 10 Vict. c. 2. provided that, if any misunderstanding should happen between the Society and any of its members, the matter should be submitted to the decision of arbitrators according to stat. 10 G.

FRIENDLY SOCIETY.

c. 56., nine of whom should be elected in the first quarterly meeting after the passing of the said laws: and that, when any dispute should arise, the names of the arbitrators should be shuffled in a box or glass, and the first five names taken up by the complaining party should be arbitrators for the question at issue, and their decision should be final. The Society, at their first quarterly meeting, appointed a general committee for the purpose of electing arbitrators; and nine arbitrators were shortly afterwards elected. Afterwards, in consequence of some of them having left the neighbourhood, and of others having refused to act if called on, the general committee elected nine new arbitrators in the place of the first set. After the first election, but before the second, *D.*, a member of the Society, was expelled for an infringement of one of the rules, as directed by the rule itself. He applied, after the second election of arbitrators, to have the question of his expulsion referred to arbitration. The Society appointed a day for that purpose; and *D.* and six of the arbitrators last attended. *D.* refused to draw five names out of the nine, according to the rule; and he eventually, with the consent of the Society, signed an agreement, submitting the dispute to five out of the six arbitrators then present (he having been previously allowed, on his own request, to reject any one of the six he chose); their decision to be final. The five arbitrators made their award, adjudging him to be properly expelled. *D.* applied for a rehearing, which was granted; but, upon the meeting for a rehearing, *D.* refused to select his arbitrators according to the rule; and he subsequently made a complaint before justices, under stat. 4 & 5 W. 4. c. 40. ss. 7., 8.; and the justices made an order requiring the Society to reinstate him, or to pay him 50*l.*

Held, that the justices had no jurisdiction to make such order, there having been no neglect or refusal by the arbitrators to make an award, and it not being open to *D.* to contend that the application for settlement by arbitration had not been complied with

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in forty days, he being estopped by the written agreement, from disputing the validity of the appointment of the arbitrators. *Regina v. Evans*, 363.

2. What not a neglect or refusal by arbitrators, 363. *Ante*, 1.

3. Appointment of arbitrators, 363. *Ante*, 1.

V. Jurisdiction of justices.

What informality in arbitration does not give jurisdiction to reinstate, 363. *Ante*, IV. 1.

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I. Expences of county gaol, 763. *County*, I.

II. Rateability, 346. *Poor*, IV. 2.

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That there was no evidence giving the justices jurisdiction, 607. *Conviction*.

HEALTH.

See *Board of Health*.

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When he takes as special occupant, 918. *Devise*, IV.

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I. Rules for maintenance of highways.

1. District rates under Public Health Act.

Under the Public Health Act, 1875, s. 10 & 11, Part II, C. 26, is applied to a district comprising several parishes, the expenses of repairing and maintaining the highways within the district are to be met by a district rate to be levied by the Local Board of Health under that act, and not by rates levied through the Local Board of Health s. 10, sect. 11, to act as surveyors of highways within the district. *Essex v. Norwich Board of Health*, 1887.

2. Powers of Local Board, 1889. Part IX.

II. Surveyors.

1. Liability of surveyors, 1841. Part IV.

2. Local Board of Health, 1875. Sect. 11. 1889. Part IX.

III. Indictment.

1. For non-repair removed by curators, 1875. Curators, III.

2. For obstruction: amendment of misdescription, 734. Amendment II.

3. Whether it is a misdescription to describe the whole as a highway where part is a carriage way, 734. Amendment II.

4. Immaterial obstruction, 942. New Trial, I. 1.

5. New trial after acquittal. *Regina v. Cricklade*, 947 a.

IV. Costs of prosecution ordered by justices.

1. Out of what rate to be paid.

Sect. 55 of the General Highway Act, 5 & 6 W. 4. c. 50. (which enacts that, in the case of an indictment for

non-repair of a highway in the highway or quarter is over of justices as there the case is the information obtained by the justices with the justices of such quarter to be paid out of the rate levied in pursuance of the statute in which such highway situated: extends not only to the cost of the highway generally, and if there be a great number in the parish of highways at that time, they must take for the purpose.

The order made not only surveys in office at the time, & successors, until the costs be

Such costs are not, in meaning of sect. 55, penalties levied or authorized but to be imposed for any against the same, nor being from a surveyor, nor costs and allowed and ordered by the s. of the Act the manner of levying and applying of which thereby otherwise particularly ed. And therefore they can levied by justices under the s. ings directed by that section. mandamus will issue to compel making of the proper steps. v. *Essex*, 294.

2. After removal by curators: section.

Justices having, under sect. W. 4. c. 50. s. 56, ordered a b preferred at the assizes against inhabitants of a parish, for no of a highway, the prosecutor the case by certiorari into this and it was tried on the 2nd pe at the assizes: and a verdict w. for the Crown.

Held that the prosecutor entitled to costs, though the p. the section speaks only of ren a defendant.

And that a Judge's order, d the costs to be paid out of " made and levied" in the p. according to the statute, was not reason bad.

The order did not name the

of costs. Held, on motion to set the order aside, that it was nevertheless good.

A side bar rule was obtained for the coroner and attorney of this Court to tax the amount. Held proper, by Lord Campbell C. J. and Erle J., dissentiente *Crompton J. Regina v. Eardisland*, 960.

3. Validity of order of judge at Nisi Prius, 960. *Ante*, 1.
4. Successors bound, 390. *Ante*, 1.
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6. Judge's order good though not naming the amount, 960. *Ante*, 2.
7. Side bar rule to tax the amount, 960. *Ante*, 2.
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9. By whom to be ascertained and when, 960, 966. *Ante*, 2.

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Notwithstanding provision for repair by local act affecting only part of the parish, 989. *Post*, IX. 1.

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2. Extent of appellate jurisdiction, 477. *Certificate*, I. 1.

VII. Penalties, costs, &c., recoverable by distress.

What costs are not, 390. *Ante*, IV. 1.

VIII. Turnpike: appropriation of funds.

1. Effect of stat. 4 & 5 *Vict. c. 59.* on order of appropriation in special act.

A turnpike Act, 7 *G. 4. c. xvii.*, appropriated the turnpike funds in the first place to the repairs of the road, and afterwards to the payment

of interest on the moneys borrowed on the security of the road. The trustees, after the passing of stat. 4 & 5 *Vict. c. 59.*, applied the funds in paying arrears of interest on the borrowed money, accrued due in previous years: in consequence, the funds were insufficient to repair the road. Justices, at a special session for the highways, made an order, under stat. 4 & 5 *Vict. c. 59.*, on a parish to contribute to the repair of the part of the turnpike road within that parish. On appeal, the Sessions quashed the order, subject to a case, in which it was found that, if the payment of arrears of interest was a legal appropriation of the funds, the order of the justices was right, but otherwise not.

Held: that the order of appropriation in the local Act was not altered by stat. 4 & 5 *Vict. c. 59.*; and, consequently, that the payment by the trustees was improper. That the justices had discretionary power to make such an order, if expedient, notwithstanding that the insufficiency was occasioned by the misappropriation of the funds; but that the Quarter Sessions exercised a sound discretion in reviewing their decision, and quashing the order under the circumstances. *Regina v. South Shields Turnpike Roads, Trustees*, 599.

2. Effect of misappropriation, 599. *Ante*, 1.
3. Payment of interest under stat. 13 & 14 *Vict. c. 79. s. 4.*, 599. *Ante*, 1.

IX. Turnpike: contributions from parish.

1. From district under Public Health Act.

By a local and personal public Act (1 & 2 *G. 4. c. lix.*), *W.*, a hamlet in the parish of *B.*, was constituted a town, but was still to continue part of the parish of *B.*, and, as such part, was to be charged with all rates, tithes and other payments as before the Act. Commissioners were appointed for the government of the town; and it was enacted that, as

soon as any street, way, &c., within the town, previously repairable by the surveyor of *B.*, should be repaired by the Commissioners, the surveyor of *B.*, so long as it was kept repaired by the Commissioners, should pay the Commissioners a part of the highway rate of *B.*, proportionate to the part situate in *W.*

By another local and personal public Act (7 *G. 4. c. x.*), trustees were appointed for protecting from the overflowing of the sea, and otherwise improving and maintaining, an ancient road running through *W.*, which, before the first mentioned Act, was repairable by the surveyor of *B.*; whether ever repaired by the Commissioners, did not appear. The trustees had the power to take tolls upon the road, and other powers ordinarily given to turnpike road trustees; and the road was called in the Act a turnpike road. The trustees were also, by their works, to protect from the sea certain lands in *B.*, and were to receive from the owners a fixed sum to be levied upon them by rate. The Act saved the power of the Commissioners, except that they were freed from the expence of maintaining so much of the road as lay within *W.*

Held: (1) That the trust was a turnpike trust within the meaning of stat. 4 & 5 *Vict. c. 59.*, authorizing the application of a portion of highway rates to turnpike roads.

(2) That the inhabitants of *W.* were not, by the Act last mentioned, exempted from the liability to apply the highway rate to the turnpike road.

W. was constituted a district within The Public Health Act, 1848 (11 & 12 *Vict. c. 63.*), and a local board was appointed. The turnpike trust funds being insufficient for the repair of the road, justices, under stat. 4 & 5 *Vict. c. 59. s. 1.*, made an order on the surveyor of *B.* to pay to the trustees a portion of the highway rate of *B.* to be laid out in the repair of a part of the road situate in *W.*

Held: (3) That, as by sect. 117 of The Public Health Act, 1848, The Local Board were exclusively the surveyors of the highways of *W.*, the order was bad, and that The Local

IMPOSSIBILITY.

Board might be ordered to contribute to the expence of the turnpike within *W.*, by a highway rate levied by them on *W.*, although, under sects. 86, 87, they could not apply district rates to that purpose, although, under sect. 68 (interpreted by sect. 2), the turnpike road was vested in them or under their management. And that the inhabitants of *W.* were not liable to application of their highway rate to the repair of the turnpike road within *W.* *Regina v. Worthing Road Trustees*, 989.

2. Discretionary power of justices notwithstanding misappropriation funds, 599. *Ante*, VIII. 1.

3. Discretion of sessions on appeal, 599. *Ante*, VIII. 1.

4. What is a turnpike trust within stat. 4 & 5 *Vict. c. 59.*, 989. *Ante*

X. Turnpike: debt, interest.

1. Current year's interest how provided for, 599. *Ante*, VIII. 1.

2. Arrears of interest how regarded, 599. *Ante*, VIII. 1.

HOLDER.

Bona fide, 683. *Bills*, IV.

HUSBAND.

Irremoveability of, 596. *Poor*, XI.

IDENTIFICATION.

Production of deed for, 430 *Deed*,

ILLEGALITY.

Illegal consideration.

Price of land conveyed for illegal object, 642. *Covenant*.

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When it excuses.

INDEBITATUS COUNIS.

Acceptance of office when full of an usurper, 249. *Election*, I. 1.

INDEBITATUS COUNTS.

Variation from forms, 650. *Account Stated*, I.

INDEMNITY.

I. Parol contract to return deposits on failure of scheme, 307. *Contract*, I. 1.

II. Effect of indemnification clause in subscribers' agreement, 307. *Contract*, I. 1.

INDICTMENT.

I. Amendment of, 734. *Amendment*, II.

II. Removal by certiorari, 547. *Certiorari*, III.

III. In particular instances.

For obstructing a navigation, 942. *New Trial*, I. 1.

IV. See also *Criminal Law*.

INDORSEMENT.

I. On ca. sa., 929. *Arrest*, I. 1.

II. Of bill of lading, 622. *Bill of Lading*, I. 1.

INDUCEMENT.

Deed of submission, inducement to action on award, 83. *Accord*, I.

INNKEEPER.

Duty to take care of guest's baggage, 144. *Bailment*, I.

INSOLVENT DEBTOR.

See *Debtor*, II.

INSURANCE. 1047

INSPECTION.

I. Of register of shareholders by creditor of company, 784. *Company*, V. 1.

II. Under Patent Law Amendment Act, 969. *Patent*, II. 2.

INSPECTOR.

Of weights and measures, 640. *Certiorari*, II.

INSTALMENT.

Breach by nonpayment of, 83. *Accord*, I.

INSTITUTION.

Literary or scientific.

Rateability. *Poor*, III.

INSURANCE.

FIRST: Marine Insurance.

I. Time policy.

Notice of abandonment after expiration of the term, 180. *Post*, II.

II. Total loss: permanency.

What right of possession after capture and recapture does not make the loss cease to be total.

A ship was insured on a time policy, for a year ending 21st April 1852. In December 1851, being on her homeward voyage from Valparaiso to Liverpool, she was captured by pirates in the Straits of Magellan: in January 1852 she was recaptured by an English war steamer; and a prize master took the command, and brought her to Valparaiso. Intelligence of all these facts reached the owners, at one time, about the end of April 1852; and they, on 30th April 1852, gave notice of abandonment to the underwriters, stating that intelligence had arrived "of the condemnation at Valparaiso" of the vessel "as a prize to Her

Majesty's steamer." The underwriters refused to accept.

The vessel was sent home by the recaptors from *Valparaiso*, under the command of a prize master, with instructions to proceed to *Liverpool*, and obtain an adjudication in the Court of Admiralty. She met with bad weather, and put into *Fayal* on 19th August 1852, where she was sold by the prize master, being then in a state not justifying the sale.

In December 1852, the owners commenced an action against the underwriters, claiming for a total loss. Held: that they were entitled to recover as for a total loss, there having been a total loss by the piratical seizure, in the first instance, and the owners not having afterwards, up to the time of the commencement of the action, had either actual possession or the means of obtaining it: and it being immaterial whether there was or was not a right of detainer against the owners.

That the notice of abandonment was early enough, being given in reasonable time after the receipt of the intelligence of the loss.

That the inaccurate statement of the vessel having been condemned as a prize at *Valparaiso* did not vitiate the notice. *Dean v. Hornby*, 180.

III. Loss by pirates.

Recapture and sale for repairs, effect as to loss being total, 180. *Ante*, II.

IV. Recapture.

When the loss does not cease to be total, 180. *Ante*, II.

V. Notice of abandonment.

When given in reasonable time, 180. *Ante*, II.

2. Inaccurate statement in, as to condemnation, 180. *Ante*, II.

SECONDLY: On lives.

VI. Recitals in policy.

1. Whether, and as against whom, an estoppel.

The *M.* insurance Company cut a deed poll which was a policy for one year on the life. It was in the ordinary printed form for such policies, and commenced with a recital that the assured had on November last caused to be delivered into the office of the *M.* a declaration in writing, signed by them, touching the age, past and present health and other circumstances relating to which the assured had agreed should be the basis of the contract. There was the usual proviso that if anything in the declaration was untrue the policy should be void. In an action on this policy the *M.* pleaded that the declaration was untrue.

On the trial, it appeared that the policy was one of reinsurance by *B.* Company, who had several years before insured *O.*'s life for a large sum. On the negotiation for the reinsurance all the papers relating to the original insurance were shewn to the *M.* The *M.* sent to the *B.* one of their printed forms for a proposal of reinsurance, adapted to the case of original insurance, having many printed questions relating to the health of the party, with blanks for the answers, and, below, a printed declaration that the person whose life was to be insured that the above statement was true and an agreement on the part of the persons who were to be assured that the declaration should be the basis of the contract, and that if any thing therein contained was untrue the policy should be void; with blanks at the bottom of the declaration for the signatures of the person whose life was to be insured, and of those in whose favour the insurance was to be made. The *M.* had bracketted together, in ink, the questions relating to the health of *O.*, and written "for the particulars see *B.* papers attached." The manager of the *B.* signed under this his name, and returned the paper with the blanks for the signature of the declaration not filled up. The papers were those relating to the original insurance, and contained a declaration by *O.* as to his then state of health. It was now admitted that this declaration was then true.

that the state of *O.*'s health had, without the knowledge of either the *M.* or the *B.*, changed, and the declaration, referred to the state of health at the time the paper was sent to the *M.*, would no longer be true. After this paper had been sent in, the policy was executed, and sent to the *B.*, who received and kept it without observation on the form of the recital. Some evidence was, without objection, given of a custom in reassurances to confine the declaration to the state of health at the time of the original insurance.

The learned Judge left it to the jury to consider all the circumstances, and say whether it was intended by both parties that the paper should be understood as a declaration as to *O.*'s present health. The jury found for the plaintiff. On a motion for a new trial the Court were equally divided.

Erle J. held that the terms of the policy shewed that the contract was on the basis of there being a declaration as to the then state of *O.*'s health, and that the assured seeking to enforce it could not aver that there was no such declaration: further, that, by acting on the policy containing a recital that there was such a declaration, the assured had concluded themselves from denying that there was such a declaration: further, that the evidence of usage was inadmissible: and for these reasons that there should be a new trial.

Wightman J. thought that the assured, by acting on the policy containing the recital, had not concluded themselves from denying that there was such a declaration; but that they had made such weighty evidence against themselves that it was misdirection not to urge this very strongly to the jury. And for this reason he held that there should be a new trial.

Coleridge J. thought that the name attached to the paper in question might or might not be a signature to the whole paper, and that it was a question for the jury whether it was so or not: that this question was properly left to the jury, and that, if it was for the Court to construe the declaration, he should construe it in the same way as the jury; and that, the

evidence of custom having been admitted without objection, it was not material to consider whether it was admissible or not: and that the recital, being only by the defendants, did not conclude the assured. He therefore held that the verdict should stand.

Lord *Campbell C. J.* thought that, the writing being imperfect and ambiguous, so that there was some question for the jury on it, it became a question for them to construe the whole; that, if the intention had been to represent that there was such a statement, there would have been an estoppel, but, if there was no such intention, the defendants' recital did not estop the other side: that the evidence of custom was not irrelevant: and, supposing it to be a question for the Court, that the conclusion to which the jury had come was right. He therefore held that the verdict should stand.

The rule dropped. *Foster v. Mentor Life Assurance Company*, 48.

2. As to health, in a policy of reassurance, 48 *Ante*, 1.

VII. The signed declaration.

Place of signature, 48. *Ante*, VI. 1.

VIII. Warranty.

As to health, 48 *Ante*, VI. 1.

IX. Evidence.

Custom in policies of the particular class, 48. *Ante*, VI. 1.

THIRDLY: Against fire.

X. Implied warranties by the assured.

That he will not alter the premises so as to increase the liability.

By a policy executed in *London*, on 7th April 1851, premises in *California* were insured against fire for a year from 1st February 1851. The premises were described in the policy as "a brick building used as a dwelling house and store (described in the paper attached to this policy)." The paper attached gave a minute description of a two storied house, with what purported to be a certificate that the

description was accurate, signed on 30th *October*, 1850. The description was, in fact, accurate up to *March*, 1851; in which month the assured altered the house by adding a third story. This was unknown in *London* when the policy was signed. In *May*, 1851, the house, thus altered, was destroyed by fire. In an action on the policy, on a case stating the above facts:

Held, that the description in the policy amounted to a warranty that the assured would not, during the term insured, voluntarily do anything to make the condition of the premises vary from that description, so as to increase the liability of the assurer: that this warranty was broken; and, consequently, that the plaintiffs could not recover. *Sillem v. Thornton*, 868.

XI. Alterations.

By adding to the premises insured, 868. *Ante*, X.

INTENTION.

As to the effect of a signature, 48, 72. *Insurance*, VI. 1.

INTEREST.

I. In a contract.

What is: disqualification by, 530. *Contract*, II.

II. On money.

1. What written claim sufficient, 307. *Contract*, I. 1.

2. Made payable by coupons, 1, 37. *Bank*, II. 1.

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See *Burial*.

INTERPRETATION.

See *Construction*.

INVENTION.

Novelty how disproved, 256. *Patent*, I. 1.

JUDGMENT.

IRREGULARITY.

Waiver by conduct, 363. *Fraternity*, IV. 1.

JUDGE.

I. At nisi prius or assizes.

1. Order for costs, when not not ascertaining amount, 960 *way*, IV. 2.

2. Distinction between judge and terminer and judge prius, 960, 966. *Highway*,

3. When functus officio, 960 *Highway*, IV. 2.

4. What expression of opinion direction, 48. *Insurance*, V.

II. At Chambers: his orders.

Time of applying to set aside *County Court*, II.

III. Foreign.

Commission to as an individual *Witness*, I. 1.

JUDGMENT.

I. As a charge on land.

1. Effect of registration, before *cution*.

Ejectment for lands in *Middlesex*. On a case stated it appeared that being possessed of a term for nine years in the lands, conveyed by way of mortgage to the plaintiff on 19th *June*, 1852. The mortgage was registered in *Middlesex* on 5th *June*. Defendant, on 5th *June*, obtained a judgment in the Court Bench against A. On the same day the judgment was registered in *Common Pleas*: it never was registered in *Middlesex*. On 8th *Sept* 1852, an *ejectment*, issued; and the same were delivered to defendant.

Held: that the judgment charge on lands in general,

stat. 1 & 2 *Vict. c. 110. s. 13.*, from the time it was registered in the Common Pleas, but that by stat. 2 & 3 *Vict. c. 11. s. 5.*, it had no other effect against a bonâ fide purchaser, for value and without notice, than a docketed judgment before stat. 1 & 2 *Vict. c. 110.* That a docketed judgment would not, before that Act, have bound a term for years until execution; and consequently that the plaintiff, being a bonâ fide purchaser of this term of years before the execution, was entitled to the lands as against the defendant, the judgment creditor.

Held also that, these lands being in *Middlesex*, the judgment, though registered in the Common Pleas, did not bind the lands till a memorial was registered in *Middlesex* under stat. 7 *Ann. c. 20. s. 18.*

For both reasons plaintiff had judgment. *Westbrook v. Porter*, 737.

2. Necessity for registration of memorial in register county, 737. *Ante*, 1.

II. As a charge on stock.

Against a previous charge of which no notice has been given to the trustees.

A., an attorney, employed by *B.* to invest money, lent it to *C.* on an agreement, by which *C.*, as a security, charged his interest in 5000*l.* consols, standing in the names of trustees in trust for *C.* *A.* neglected to give notice to the trustees. A judgment creditor of *C.*, subsequently to this loan, obtained a charging order under stat. 1 & 2 *Vict. c. 110. s. 14.*, notice of which was given to the trustees. *C.* obtained the benefit of the insolvent Act. *B.* brought an action against *A.* for negligence: on the trial, the Judge directed the jury, in estimating the damages, to consider that, as no notice had been given to *C.*'s trustees of the charge in favour of *B.*, the subsequent charge created by the Judge's order had priority over it.

On a rule for a new trial:

Held by Lord Campbell C.J., Wightman J., and Crompton J., that the direc-

tion was correct, and that the judgment creditor had the same rights as a subsequent incumbrancer without notice, and was, therefore, to be preferred in equity to *A.*

Erle J. dissentiente, and holding that the judgment creditor had only those remedies which affected what, at the time of the charging order, remained the property of the judgment debtor. *Watts v. Porter*, 743.

III. Judgment roll.

Practice on error in Parliament, 731. *Error*, I.

IV. Foreign.

Recovered by assignee of the debt sued for, 236. *Debt*.

JUDGMENT AS IN CASE OF A NONSUIT.

Proceedings substituted under Common Law Procedure Act, 987. *Procedure*, I.

JURISDICTION.

I. Shewing jurisdiction on the face of proceedings.

On certificate for diversion of highway, 477. *Certificate*, I. 1.

II. Habeas corpus for want of.

Jurisdiction may be negatived by affidavit, 607. *Conviction*, I.

III. In particular instances.

1. Appellate jurisdiction of sessions, 477. *Certificate*, I. 1.

2. Of compensation jury, 443. *Compensation*, I.

JURY.

I. Effect of their finding either way, 549. *Carrier*.

II. Question for.

1. As to the effect of signature, 48. *Insurance*, VI. 1.

2. Title not a question for compensation jury, 443. *Compensation*, I.

JUSTICE OF THE PEACE.

I. Jurisdiction in particular cases.

To reinstate member of Friendly Society, 363. *Friendly Society*, IV. 1.

II. Proceedings in particular cases.

1. Certificate for diversion of highway, 477. *Certificate*, I. 1.

2. Direction of visiting justices, 763. *County*, I.

III. Visiting justices.

Their direction to treasurer to pay expences, 763. *County*, I.

IV. Order in lieu of a mandamus.

What facts to be shewn on applying for the rule.

The ratepayers of a district of a parish adopted so much of the provisions of stat. 3 & 4 W. 4. c. 90. as relate to lighting, ordered a certain sum to be raised for the succeeding year, and elected inspectors; and a treasurer was appointed. The inspectors, in the course of the year, called upon the overseers of the parish to collect and levy, and pay to the treasurer, a part of this sum. The overseers not having obeyed, a summons was taken out, reciting an information that they had neglected to pay to the treasurer the amount of the order made on them by the inspectors in pursuance of the statute, and requiring them to appear to answer the information, and be dealt with according to law. They appeared, and made their defence against the complaint, which was supported on behalf of the inspectors; when the justices refused to issue a warrant of distress on the overseers in pursuance of sect. 38, though they were requested, on the part of the inspectors so to do.

A rule was obtained, under stat. 11 & 12 Vict. c. 44. s. 5., calling on the justices and overseers to shew cause why the justices should not issue such warrant. The affidavit on which the rule was granted shewed

the above facts, but did not shew whether any or what evidence was given before the justices at the trial, or what the defence was.

The overseers having made an affidavit in answer, but opposed the rule on the ground that it appeared that any facts had been shewn before the justices making it bent on them to issue their verdict, this Court made the rule absolute, with costs to be paid by the overseers. *Regina v. Deverell*, 372.

V. Action against.

Notice must shew which section of the complaint is under, 724. *III. 1.*

KNOWLEDGE.

When essential in action for breach of contract, 402. *I. 1.*

LADING.

Bill of Lading, *Bill of Lading*.

LAND.

Illegality of disposal by lottery. *Covenant*.

LANDLORD AND TENANT.

I. Rights of tenant.

Protection against ill consequences of adjacent property. *landlord*, 128. *Drainage*.

II. Sale of farm produce.

Prohibition of use by purchaser. *wise than seller could have used*.

Sect. 11 of the Act "To regulate the sale of farming stock taken in execution," 56 G. 3. c. 50., enacts that no assignee of any bankrupt or insolvent debtors' estate, or under a deed of sale, nor any purchaser of the chattels, stock or crop of any land employed in husbandry, on land let to farm, shall use or dispose of the produce of such land in any manner, and for any other purpose

than such bankrupt, insolvent, or other person so employed in husbandry, ought to have used or disposed of the same if there had been no bankruptcy, assignment or sale made.

Held: that this prohibition as to purchasers is not confined to purchasers under an execution. *Wilmot v. Rose*, 563.

III. See also *Lease*.

LANDS CLAUSES CONSOLIDATION ACT.

Compensation. *Compensation*.

LEASE.

I. Generally.

1. Rent reserved, how far evidence of annual value, 491. *Poor*, V. 2.
2. When bound by judgment: registration, 737. *Judgment*, I. 1.

II. Title to leaseholds.

Conclusiveness of probate, 399. *County Court*, I. 1.

LIFE.

I. Estate.

1. Special occupancy, 918. *Devise*, IV.
2. Devise of. *Devise*, III. IV.

II. Life insurance. *Insurance*, VI. IX.

LIGHTING AND WATCHING.

Adoption of the stat. 3 & 4 *W.* 4. c. 90.

I. What churchwardens are to give the notice of meeting, 688. *Churchwardens*, II.

II. Consequence of acting on an adoption at meeting improperly convened, 688. *Churchwardens*, II.

III. Regularity of proceedings, 372. *Justice of the Peace*, IV.

LIMITATION.

I. Of actions: stat. 9 *G.* 4. c. 14. s. 1.

Delivery of negotiable security on account.

Where a bill of exchange has once been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill: the promise implied from such delivery not being, within the meaning of stat. 9 *G.* 4. c. 14. s. 1., "an acknowledgment or promise by words only," and the word "payment" in the proviso in that section being used in the popular sense, so as to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking of it in satisfaction of the debt. *Turney v. Dodwell*, 136.

II. Of estates. *Devise*.

LOAN.

Distinguished from a purchase of the security, I. *Bank*, II. 1.

LODGINGS.

Responsibility for care of lodger's baggage, 144. *Bailment*, I.

LONDON.

Companies of the city.

Mercers' Company: charter, election of wardens, 377. *Corporation*, I. 1.

LOSS.

Total, 180. *Insurance*, II.

LOTTERY.

For disposal of land, 642. *Covenant*.

MAJORITY.

Where votes are thrown away, 249. *Election*, I. 1.

MALICE.

I. Necessity of alleging in notice of action, 724. *Action*, III. 1.

II. Malicious arrest, 929. *Arrest*, I. 1.

MANDAMUS.

I. When the proper remedy.

1. To enforce payment of costs of highway prosecution, 390. *Highway*, IV. 1.

2. To permit creditor to inspect register of shareholders, 784. *Company*, V. I.

II. When it lies or does not lie.

1. What not a refusal to act, 477. *Certificate*, I. 1.

2. Not to proceed to an election on the ground that good votes have been rejected, which would not have altered the result, 718. *Churchwarden*, I.

III. Writ.

Misnomer: amendment. *Regina v. Derbyshire, &c., Railway*, 788.

IV. Order in lieu of a mandamus, *Justice of the Peace*, IV.

MARINE.

Irremoveability of, 596. *Poor*, XI.

MARINE INSURANCE.

See *Insurance*, I.—V.

MASTER AND SERVANT.

I. Responsibility of master for acts of servant.

Negligence of servant of boarding-house keeper, 144. *Bailment*, I.

II. Contract for wages.

Promise to pay increased wages, when void for want of consideration, 559. *Contract*, IV. 1.

III. Obligation of contract.

When not affected by desertion of fellow servant, 559. *Contract*, IV. 1.

IV. Summary conviction.

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1. Conviction and warrant in different instrument, *Conviction*, I.

2. Negating jurisdiction, *vit*, 607. *Conviction*, I.

V. Relation of seaman and ship, *Shipping*, VI.

MAXIMS.

1. Utile per inutile non viciatur, *Bank*, II. 1.

2. Ut res magis valeat quam nocet, *Bank*, II. 1.

3. Semper præsumitur omnia iura esse salva, *Witness*, I. 1.

4. Against derogation from a grant, 128. *Drainage*.

5. Nemo tenetur ad impossibile, *Election*, I. 1.

6. In contractibus tacite veniunt quæ sunt moris et consuetudinis, *Custom*, I.

7. Semper præsumitur pro reo, *Costs*, III.

8. Nemo debet bis vexari pro eadem causa, 942. *New Trial*.

MAYOR.

See *Municipal Corporation*.

MEASURE.

I. Penalty on selling by unequal measures. Local measure in a given weight.

Stat. 5 & 6 W. 4. c. 63. s. 1. provides that all local or customary measures shall be taken into consideration and imposes a penalty on every person who shall sell by any denomination of measure other than one of the measures, or some multiple or part thereof.

Held that this applies only to measures of capacity, and not to measures of weight, and in sale by weight estimated in pounds.

And that, therefore, it does not extend to sale by any local denomination of measure, or to sale by weight. As to sale of wheat by

MEDICINE.

hobbett, it appearing by evidence that this designated 168lbs. weight, and that a sale by hobbett entitled the purchaser to so many pounds of wheat. *Hughes v. Humphreys*, 954.

II. Appointment of inspector. See *Weights and Measures*.

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Supply on board ship, 402. *Action*, I. 1.

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Consequences of its being improperly convened, 688. *Churchwarden*, II.

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Of judgment in register county, 737. *Judgment*, I. 1.

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Commission Merchant, 283. *Agent*, I.

MERGER.

Of parol contract in deed, 307. *Contract*, I. 1.

MIDDLESEX.

Registration in, 737. *Judgment*, I. 1.

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Remedy.

In criminal prosecutions, 942. *New Trial*, I. 1.

MISJOINDER.

Amendment at what stage, 396. *Amendment*, I.

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Amendment of, in writ of Mandamus. *Regina v. Derbyshire, &c. Railway*, 788.

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MISTAKE.

Of fact.

In notice of abandonment, 180. *Insurance*, II.

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I. When it prevails against prior judgment, 737, I. 1. *Judgment*.

II. Of equitable interest in stock. Necessity of notice to trustees, 743. *Judgment*, II.

MUNICIPAL CORPORATION.

I. Election of councillors.

1. Ineligibility of an alderman, 249. *Election*, I. 1.

2. Throwing away votes on ineligible candidate, 249. *Election*, I. 1.

3. Notice of election to person elected, how shewn in special verdict, 249. *Election*, I. 1.

4. Acceptance in five days excused by office being full of an usurper, 249. *Election*, I. 1.

5. New election when not necessary on an ouster by quo warranto, 249. *Election*, I. 1.

II. Mayor.

Effect of disqualification as alderman, 530. *Contract*, II.

III. Alderman.

1. Ineligibility as councillor, 249. *Election*, I. 1.

2. Disqualifying interest in contract, 530. *Contract*, II.

IV. Disqualifying interest in contracts.

1. Sale of materials to a contractor, when not, 530. *Contract*, II.

2. What not, as being a security for money only, 530. *Contract*, II.

3. Effect of contract with the corpo-

NAVIGATION

Where it is necessary to have a Board of Health. 201. *Contract II*

A. Effect of obstruction in navigation in navigation. 201. *Contract II*

V. In navigation in Board of Health.

Admission increased in navigation. 201. *Contract II*

VI. Officers, survey, board.

Effect of obstruction in navigation in navigation. 201. *Contract II*

VII. Insurance.

Change in nature of office. 201. *Contract II*

VIII. Penalties.

For acting as Master while interested in contract. 201. *Contract II*

NAVIGATION

I. Indemnity for obstruction.

1. Whether it is in substance a proceeding to try a civil right. 942. *New Trial I. I.*

2. Effect of the obstruction being very insignificant. 942. *New Trial I. I.*

3. Misdirection and its remedies. 942. *New Trial I. I.*

II. See also *Shipping*.

NEGLIGENCE

Of servant of boarding-house keeper. 144. *Bediment, I.*

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Rights of, in respect of nuisance, 128. *Drainage.*

NEWS ROOM.

Ratesability, 416. *Poor, III. 1.*

NEW TRIAL.

I. In criminal cases.

1. After a verdict of acquittal, under what circumstances.

NEW TRIAL

Where a prosecution is not a fact, is in substance a proceeding to try a civil right, after an acquittal, new trial for misdirection necessary in the evidence, necessary itself to correct errors by merely setting aside.

Where whether it is obstructing a navigation will be within this rule.

Per Lord Campbell C.J. per Curiam J. it is not.

Per Coleridge J., sensible that it comes within misdirection or finding facts must to justify grant, be more palpable than in proceedings which turn.

The judge, on the trial indictment, asked the jury they thought the erection "a material nuisance," in they were to find a verdict but told them that, if they "nuisance" was so slight uncertain that the defence not to be made criminally they should acquit him: a saying that they considered this, "although a nuisance sufficiently so to render the criminally liable," he acquitted. On motion for for misdirection:

Held by Coleridge and J., and sensible per Lord C.J., that the charge was understood as meaning, not that a legally commit a small nuisance that an obstruction might be significant as not to constitute: and that the jury must be as finding that the obstruction was so insignificant, therefore, there was not a warranting a new trial. *Russell, 942.*

2. After acquittal on indictment nonrepair of a highway. *Cricklade, 947, n.*

II. In civil cases.

When Court equally divided 722. *Costs, III.*

III. Costs.

Allowance for party witness, remaining in this country, 902. *Costs*, II. 1.

NISI PRIUS.

Judge's order for costs of highway prosecution, 960. *Highway*, IV. 2.

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Substitution of, 307. *Contract*, I. 1.

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Promissory. *Bills of Exchange and Promissory Notes*.

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I. Novelty of the invention.

1. How disproved : previous

To a declaration for infringing a patent, the defendant pleads the invention was not new, been publicly and generally used and used in *England* before the date of the patent.

It was proved that, before of the patent, five different had used the process independent of three of them without concealment and all five had publicly and generally sold, for their own profit, the thereby produced. It did not follow that there had been any other production of the invention. He upon this evidence, the plaintiff proved.

Semble, per *Erle J.*, that it would have been proved by the plaintiff that, before the date of the patent, any one person had, for his own profit, produced the article by the process and sold it publicly and generally, though he had used the process secretly, and concealed its production. *Heath v. Smith*, 256.

2. Effect of concealment in relation to previous user, 256. *Ante*, 1.

II. Account.

1. Retrospective, at what stage proceedings.

Pending an action for infringement of a patent for an invention, obtained, under The Patent Amendment Act, 1852, a defendant that defendant should render an account of the sale of the (alleged to be pirated) sold by the action, and of the profit made from : and keep an account of the articles to be sold and of the proceeds therefrom : and that plaintiff

inspect the defendant's books. The rule was drawn up on an affidavit that plaintiff had the patent, and that defendant had infringed it, after notice. Cause being shewn,

Held : that no retrospective account of profits made by sales before the action ought to be ordered before final judgment. And that the inspection mentioned in sect. 42 of The Patent Law Amendment Act, 1852, was an inspection of the articles, and not of the books. And so much of the rule was discharged.

But, held that the Court had jurisdiction to order an account to be kept in future, though no injunction was asked for, it appearing that there was a *prima facie* case of infringement: and the Court ordered that the rule should be absolute for such an account, on condition that plaintiff elected not to claim damages at the trial, and undertook, if he failed in the action, to pay defendant the expence of keeping the account so ordered. *Vidi v. Smith*, 969.

2. Not of profits before action, after verdict for damages.

In an action for the infringement of a patent, plaintiff obtained a verdict for 40s. damages. Afterwards he obtained a rule, absolute in the first instance, ordering defendant to render an account of all articles which he had before and since the commencement of the action made or sold in breach of plaintiff's patent, and pay to plaintiff the moneys received for such articles. A rule *Nisi* was obtained, on part of the defendant, to discharge this rule. By the affidavits it appeared that defendant had made profits by the sale of the pirated articles since the commencement of the action; but that he had discontinued the manufacture since the verdict and before the plaintiff's rule was obtained. And it appeared that, shortly after the action commenced, plaintiff's attorney had told the other side that plaintiff would take only nominal damages, and would, if necessary, file a bill in equity to obtain an account of the profits.

Held : that the action was still pending, so as to give this Court juris-

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diction under The Patent Law Amendment Act, 1852, sect. 42.

Held also that, there having been a verdict with damages, and there being no continuing piracy such as would give ground for an injunction, no account of the profits before action could be ordered: but, held that the defendant might be considered a trustee for the plaintiff of those profits which he had made, pending the action, after notice that plaintiff required them; and that an account of those profits might be ordered.

Rule moulded accordingly. *Holland v. Foz*, 977.

3. Prospective, *pendente lite*, on what terms, 969. *Ante*, 1.

4. Of profits *pendente lite*, 977. *Ante*, 2.

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I. Parishes and districts maintaining their own poor.

1. Evidence of two ecclesiastical districts forming one reputed parish.

Appeal against a poor rate for the parish of *M.* on the ground that the alleged parish of *M.* in truth consisted of two distinct parishes, *M. St.*

POOR.

Mary and *M. St. Peter*, each of which ought to be rated separately. A was stated with power to the Court to draw inferences of fact. By the evidence it appeared that from very early times there were de facto two rectories of *M. St. Mary* and the other of *St. Peter*, distinct parishes for ecclesiastical purposes; but that, as back as evidence went, which was beyond the beginning of the eighteenth century, there had always been a poor rate, one set of overseers, one constable for the whole of *M.* one parish for civil purposes, and highways in *M.* had been jointly maintained by the whole of *M.*

In the taxation of Pope *Nicholas* the churches of *M. St. Peter* and *St. Mary* are valued separately. In the *Nonarum Inquisitiones*, it is mentioned as one parish, in which are churches taxed conjointly. Old early records were set out which were ambiguous.

Held: that the proof of modern usage shewed that *M.* was a reputed parish at the time of the passing of the statute 43 *Eliz.* c. 2.; and, that be so, even if it was really not the parish, the rate could not now be disturbed.

Semble: that the evidence tended to shew that *M.* had been from time immemorial one parish, with churches. *Sharpley v. Mablethorpe Overseers*, 906.

2. Evidence of immemorial parish with two churches, 906. *Ante*,
3. Effect in evidence of modern usage, 906. *Ante*, 1.

II. Union fund: charges upon.

What irremovable paupers not chargeable, 341. *Post*, XII.

III. Rateable property: exemption of societies for science, literature or

1. News room not such a purpose

The Russell Institution was founded according to the prospectus, for the formation of a library of works of ancient and modern literature, and establishment of a reading room

vided with foreign and English journals and other periodical publications, and for lectures on literary and scientific subjects. The funds were raised by shares which were transferable and made the shareholders proprietors, by annual subscriptions from the proprietors, and by other annual subscriptions which entitled the subscribers to the privileges of proprietors. The library consisted of about 18,000 volumes: reviews and other periodicals, books of reference, directories, mining and railway journals, railway time-tables and newspapers, were taken in. The privilege of using all these was confined to the proprietors and subscribers. Lectures were delivered on subjects connected with science, literature and the arts, to which the public were admitted on payment, but which the proprietors and subscribers might attend without payment. The Society possessed buildings comprising a library, a theatre or lecture room, and a news room, all applied to the purposes of the Institution, some money in the funds, and some other buildings which were let off, and for which they received rent. All the income was applied to defraying the expences of the Institution. No dividend, gift, division or bonus, in money or otherwise, could, by the rules of the Society, be made unto or between any of the members. The barrister, under stat. 6 & 7 Vict. c. 36. s. 2., certified that the Society was entitled to the benefit of that Act.

Held: that it was not so entitled, as not being, within the meaning of sect. 1, a "society instituted for purposes of science, literature, or the fine arts exclusively." *Russell Institution v. St. Giles in the Fields*, 416.

2. What are voluntary contributions.

The Linnean Society of London was incorporated by Royal charter for the cultivation of the science of natural history in all its branches, and more especially of the natural history of *Great Britain and Ireland*.

It was supported by admission fees and contributions of its own fellows, who entered into an engagement to

make the payments, and were liable to ejection for non-payment. The fellows were entitled to receive copies of the published transactions.

Held, that the Society was exempt from rate, in respect of premises occupied for their business, under stat. 6 & 7 Vict. c. 36. s. 1., as being instituted for purposes of science exclusively, and supported by annual voluntary contributions; *Crompton J.* hesitating as to the question whether the payments were voluntary.

The Society let off some rooms of the house in which they transacted their business to *B.*, the occupier of the adjacent house, granting him also free use of the hall and staircase and passages of their house. Held, that this did not make the Society rateable for the rooms which they occupied for the purposes of the institution.

The librarian and porter, whose attendance in the house was necessary for the purposes of the institution, occupied rooms in the part of the house retained by the Society, and, in consideration thereof, received less salary. Held, that the Society were occupiers of these rooms, for the purposes of the institution, and that no rate could be laid in respect of such rooms. *St. Anne, Churchwardens &c. v. Linnean Society*, 793.

3. What are not voluntary contributions, 416, 427, 807. *Ante*, 1. *Post*, 4.

4. What incidental benefits to members cause the society to be not purely scientific.

The Zoological Society was incorporated by charter "for the advancement of Zoology and Animal Physiology, and the introduction of new and curious subjects of the animal kingdom." They occupied land on which were buildings appropriated as receptacles for housing animals and birds, and as a museum for stuffed specimens. Three acres, not so appropriated, were cultivated as a flower garden. Refreshment rooms on the premises were occupied for the purpose of supplying refreshment to visitors, by *M.*, who paid to the

Society a rent for this privilege. The public were admitted to the grounds, either by paying money upon each admittance, or by tickets given to them by the fellows. Once in the week, for three months in the year, the Society procured the attendance of a musical band.

Held: that the Society was not exempt from rate, under stat. 6 & 7 *Vict. c. 36. s. 1.*, the premises not being occupied exclusively for the purposes of science.

The Society was supported in part by annual contributions from the fellows and subscribers. Each fellow was entitled to personal admission, with a specified number of companions, on every day, and could also give admission at certain times by written orders and tickets, to which he was entitled: and fellows were also entitled to purchase tickets giving free admission to the bearer. Subscribers also were entitled to purchase annually an ivory ticket, admitting a named person of their family, with a companion.

Seemle: that the annual contributions by the fellows were not voluntary contributions within the meaning of sect. 1, inasmuch as the fellows and subscribers obtained a benefit, not purely scientific, in consideration of the payments. *St. Marylebone Vestry v. Zoological Society*, 807.

5. Effect of subscriber's right to receive copies of published transactions, 793. *Ante*, 2.

6. Necessary occupation by officers, 793. *Ante*, 2.

7. Effect of allowing easement to a tenant, 793. *Ante*, 2.

8. Purposes of amusement in addition to purposes of science, 807. *Ante*, 4.

IV. Rateable property: public purposes.

1. Building used for County Court.

The treasurer of a county court was lessee, under stat. 9 & 10 *Vict. c. 95. s. 48.*, of a building used for the court house, and for other purposes of the Act, exclusively.

Held: that neither the corporation nor any one else, had such a right of action of the building as to be rateable in respect thereof to poor rate. *43 Eliz. c. 2. Regina v. M. Overseers*, 336.

2. Prison, not rateable.

Under stat. 13 & 14 *Vict. c. 13*, directors of convict prisons and buildings, to be used as an establishment for the confinement and employment of convicted prisoners.

Part of the lands were occupied by a prison, a building within which prisoners were confined, and which were also a house and occupied by the governor, a dwelling occupied by other persons of the establishment; no more was occupied by the governor or than was necessary for the proper discharge of their duties and the accommodation of their families. The directors assigned the houses, and they had no discretion in this respect. Held: that no part of the prison was rateable in respect of the prison other of the matters above mentioned.

Within the precincts of the prison was a coach house and stabling occupied by the governor, of an area greater than was necessary to him to perform his duties. Held: that the governor was rateable in respect of this excess.

Within the precincts was a building occupied as a canteen for the supply of beer to the prison officers. No rate was derived therefrom beyond what was sufficient to pay the wages of the man who supplied the beer. Held: that the occupier was rateable.

Outside the precincts, but within the same parish, were buildings occupied by the chaplain of the prison, medical officer, and persons employed in the prison: none occupied more than was necessary for the discharge of their duties and the adequate accommodation of their families. The dwellings were assigned to the directors; and they had no discretion as to their place of residence. Held: that these occupiers were rateable. Per Lord Campbell C.

Wightman J. ; dissentiente *Coleridge J.*

Part of the premises outside the prison were occupied by a grocer, who supplied goods to the residents of the convict establishment and others, on his own account. Held: that the occupier was rateable.

Part of the premises consisted of land outside of the prison, within the same parish: upon this the convicts were employed; and the proceeds were disposed of exclusively for the benefit of the establishment. Held: that the occupation of such land imposed a liability to poor rate. *Gambier v. Lydford, Overseers*, 346.

3. Officer's occupation within prison, when rateable, 346. *Ante*, 2.
4. Canteen within prison, 346. *Ante*, 2.
5. Officers' dwellings outside the prison, 346. *Ante*, 2.
6. Grocer's shop outside the prison, 346. *Ante*, 2.
7. Land for employment of convicts, 346. *Ante*, 2.

V. Rateable value :

1. Payments received under contracts to make up a certain rate of dividend.

By agreement between the *E. Railway Company* and the *N. Railway Company* (confirmed by Act of Parliament), the *N. Company* agreed to complete a branch of their railway communicating with the *E. line*, and agreements were made for the interchange of traffic, and the *E. Company* bound themselves, whenever the dividend of the *N. Company*, from their earnings on their whole line, fell below three per cent., to make good the deficiency to an extent not exceeding 5000*l.*

The *N. Company* completed and worked the branch. The expenses of working the branch exceeded the gross receipts on the branch: but, the dividend of the *N. Company* from their whole line falling short of three per cent., the *E. Company* made good to

them the deficiency amounting to 3705*l.* On appeal against a rate for the relief of the poor in a parish through which the branch line passed, a case was stated in which the only question was, Whether this payment ought to be taken into account in estimating the rateable value of the branch.

Held by *Coleridge J.* and *Erle J.* that it could not be so taken into account.

Lord *Campbell C. J.* dissentiente. *Newmarket Railway Company v. St. Andrew the Less, Cambridge*, 94.

2. Price paid for purchase of a railway in the shape of rent or annuity not the criterion.

The undertaking of the *R. railway Company* was, under an Act of Parliament, let to the *S. E. Company* at an agreed rent for 1000 years; and the *S. E. Company* entered and occupied the line under the lease. By a subsequent Act, the two Companies were amalgamated; and, in lieu of the rent formerly paid to the *R. Company*, the shareholders became entitled to annuities, equivalent in amount to the rent, chargeable on the funds of the amalgamated Company, of which the *R. line* now became a branch.

Two rates were made by the overseers of the parish of *D.* on the *S. E. Company* as occupiers of a portion of the *R. line* which passed through that parish. One was made during the time that the *R. line* was the property of a separate company, but occupied by the *S. E. Company* as tenants under the lease. The other was made after the amalgamation. Notice of appeal was given against each; and a case was stated for the opinion of this Court. The first question for the Court was, in substance, Whether the rent, during the period when the line was on lease, and the amount of the annuities paid for the line after the amalgamation, were the proper criterion of the rateable value of the branch line.

Held, by the whole Court, that they were not the criterion of the rateable value, which depended upon the present annual value of the property

occupied, and might be more or less than the sum which the parties had agreed to give for it.

The case stated that traffic was brought by the *R.* line on the main line of the *S. E.* Company, and profit was thus obtained by the *S. E.* Company from the *R.* line, as a feeder to the main line of the Company: and it was found, as a fact, that, if the *R.* line was in the market, it would be an object of competition between the *S. E.* line and rival companies, and the rent would, in fact, be enhanced by such competition. The second and third questions for the Court were, in substance, Whether these matters should be taken into account in estimating the rateable value of the part of the *R.* line within the parish of *D.*, or whether the rateable value should be calculated solely on the profits of the line itself. On this:

Held, by Lord Campbell C. J., Coleridge J. and Crompton J., that both these matters were to be taken into account, inasmuch as, though lying out of the parish of *D.*, they enhanced the value of the occupation of the portion of the line in *D.*, and, though there might be much difficulty in calculating the result, the Sessions were to find it as nearly as they could.

Erle J. dissenting, and holding that the enhanced earnings on the parts of the line of the *S. E.* Company out of the parish of *D.* were to be rated in the parishes where these parts were situate, and not in the parish of *D.*, and that the only question was, what was the rent which would now be given for the occupation of the part of the line in *D.* *South Eastern Railway Company v. Dorking Overseers*, 491.

3. Parochiality of the profits, 94, 491. *Ante*, 1, 2.

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VIII. Settlement: payment of rate.

Unauthorized payment.

No settlement is gained by occupation of a tenement, by rate of payment of rates under stat. *W. & M. c. 11. s. 6.*, if the payment be made by a party not authorized the occupier to make the payment. *Regina v. Benjeworth*, 637.

IX. Settlement: estate.

Residence of party beneficially interested in a devise.

M., seized in fee of land, devised it to *A.* for life, and bequeathed his personalty to *A.*, and directed after *A.*'s death, the land should be sold within six months, and equally divided between devisor's six children; if any of the children should be dead, the share to be equally divided between the children of such child and executors were named; but estate or power of sale was expressed to be given to them.

The devisor survived *A.*, and had two daughters, and grandchildren; another daughter, some being married at the time of the devisor's death. The land was sold more than six months after devisor's death; during the whole interval, one of the surviving daughters, with her husband, resided on the land.

Held: that a settlement was gained by such residence. *Regina v. B.* 823.

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Exemption only where the husband has become irremovable by five years' residence.

The wife and children of a private marine had resided five years in the parish of *S*. The husband had not so resided. The husband being absent on Her Majesty's service, the wife and children were removed to the parish of *C*. On appeal, the Sessions quashed the order, subject to a case stating the above facts, on the ground that the wife and children were irremovable.

Held: that the wife and children might be removed notwithstanding stat. 9 & 10 *Vict. c. 66.* and stat. 11 & 12 *Vict. c. 111.*, though the husband, if present, could not have been removed in consequence of his being a marine; inasmuch as the proviso in that latter statute only prohibits the removal of the wife or children of a person who had acquired the status of irremovability under stat. 9 & 10 *Vict. c. 66.* *Regina v. East Stonehouse*, 596.

XII. Irremovable paupers; chargeable to what fund.

Those who have no known settlement.

Stat. 11 & 12 *Vict. c. 110. s. 3.* (which enacts that the costs incurred for paupers rendered irremovable by stat. 9 & 10 *Vict. c. 66.* shall, when the parish is comprised in an Union formed under stat. 4 & 5 *W. 4. c. 76.*, be charged to the common fund of such Union) is inapplicable to the case of a pauper who is irremovable by his having no known settlement, although he has resided without interruption for five years, so as to be irremovable if settled elsewhere. *Regina v. Bennett*, 341.

XIII. Removal: sickness or accident.

1. What is sickness: blindness.

Two justices made an order for the removal of a pauper, and in the warrant stated that the pauper had not

"become chargeable" to the removing parish "in respect of relief made necessary by sickness or accident." On appeal, the Sessions confirmed the order, subject to a case stating (amongst other things) that the pauper was afflicted with incurable blindness, which was the original and continuing cause of his chargeability.

Held: that blindness was sickness within the meaning of stat. 9 & 10 *Vict. c. 66. s. 4*; and that, the justices not having stated in the warrant that they were satisfied that the sickness would produce permanent disability, the warrant was bad. And this Court quashed the order accordingly. *Regina v. Bucknell*, 587.

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Sect. 37 of stat. 7 & 8 G. c. lxxv. (local and personal, public) imposes a penalty upon any person who, not being a freeman of the Waterman's Company, or an apprentice to a freeman or to the widow of a freeman, (with certain exceptions) shall "act as a waterman or lighterman, or ply, or work or navigate, or cause to be worked, or navigated, any wherry, lighter, or other craft," upon the Thames, "from or to any place or places, or ship or vessel," within the limits of the Act, for hire or gain.

Held: that a steam tug of eighty seven tons burden, employed in moving another vessel, was not a "wherry, lighter, or other craft," under this section; and that a person navigating her for this purpose, not being a free-man &c., did not thereby incur a penalty. *Reed v. Ingham*, 889.

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Covenant with the Mayor the borough of *B.* on a deed after stat. 5 & 6 W. 4. and before stat. 6 & 7 Vict. c. which, after reciting that the of the borough had elected a surer of the borough, defendant came surety to the Corporation *D.*'s accounting to them "dur whole time of *D.* continuing said office, in consequence of election, or under any annual or future election of the said corporation the said office." Averments of subsequent elections, *D.* was sued in his office and did not answer.

Plea: that *D.* was elected to office, and the deed given, while office was annual under stat. W. 4. c. 76. s. 58.; that, on November 1843, *D.* was, in obedience to stat. 6 & 7 Vict. c. 89. s. 6., removed to the office during pleasure; and he accounted up to 9th November 1843. On demurrer, the Court of Queen's Bench gave judgment for plaintiffs. Error being suggested.

Held by *Cresswell* and *Williams* and *Parke*, *Alderson* and *Martineau* affirming the judgment below the functions and duties of the office not being changed, it continued the same office; and that the change of the tenure was provided for in the language of the deed, and that *D.* did not discharge the sureties.

SURPLUSAGE.

Dissentientibus Jervis C. J., Pollock C. B. and Maule J., on the grounds that the parties to the instrument should be presumed to be contracting on the supposition that the existing law should continue to exist; that there were no words to shew that the parties intended to be bound in case the tenure of the office was changed; and that, the risk of the sureties being affected by the change in the tenure, the office did not remain the same within the meaning of the security deed.

Judgment affirmed. *Berwick, Mayor &c. v. Oswald*, 653.

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- II. Construction of. *Devise*.

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- I. Commission to examine in foreign state.

WITNESS.

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1. Notwithstanding alleged conflict of laws as to procedure and evidence.

A commission under stat. 1 W. 4. c. 22. s. 4., issued at the instance of the defendant, directed to an *English* barrister, to examine witnesses in *Germany*. The witness, a *Prussian* subject, being at *Berlin*, the commissioner went thither, but learned that, by the *Prussian* law, an oath could be administered to a *Prussian* subject only by a *Prussian* judge, or some one authorized by a *Prussian* court. On the petition of the commissioner, a *Prussian* court authorized *D.*, a *Prussian*, to administer the oath. On the commission being opened, *D.* insisted on assuming the controul of the whole examination, and rejected a question put conformably to the *English* law, on the ground that it could not be put conformably to the *Prussian* law. The parties then refused to act further under the commission.

The commissioner returned these facts: and application was then made by the defendant, for a new commission, to be directed to a *Prussian* court or judge, without the clause requiring the commissioner to be sworn. From the affidavit in support of the rule, the above facts appeared: and it appeared further, from the opinion of a *Prussian* lawyer, that the *Prussian* rules of evidence were different from the *English*, especially that examination and cross-examination by counsel was not permitted.

This Court ordered that, on payment of the costs of the first commission by the defendant, a commission should be directed to a *Prussian* judge as an individual: holding that it ought not to be assumed that the evidence would be taken improperly, and considering that, in the event of such impropriety occurring, an objection might be made at *Nisi prius*. Especially as, by this course, an opportunity would be given of raising, by error upon bill of exceptions, the question whether the issuing of such commission was within the power of this Court. *Lumley v. Gye*, 114.

2. Directed to foreign judge as an individual, 114. *Ante*, 1.

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